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## 1957

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AND

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# PREFACE

THIS is the tenth volume of *Current Legal Problems* containing, together with Lord Justice Hodson's Presidential Address to the Bentham Club, the public lectures which were delivered under the auspices of the Faculty of Laws of University College, London, during the Session 1956–57.

We wish to thank the contributors, the Publishers and the Printers, for their co-operation in securing the speedy production of this Volume. We are also greatly indebted to our colleague, Dr. B. Cheng, who, as Assistant Editor, has not only seen this Volume through the press, but also compiled the Consolidated Index to Volumes 1 to 10 as well as the Tables af Cases, Statutes and Treaties.

THE EDITORS

University College, London
*May*, 1957

## I

# SOME ASPECTS OF DIVORCE LAW AND PRACTICE

### Charles Hodson

In considering the English law of divorce it is essential to see it against its historical background, for the Court took over the jurisdiction formerly exercised by the Ecclesiastical Courts and a hundred years ago the framers of the first Matrimonial Causes Act of 1857 built upon the foundations of that jurisdiction.

When I use the word divorce I shall use it in its modern sense. Divorce *a vinculo* was formerly used to describe what is now called nullity in contrast to Divorce *a mensa et thoro,* now called separation.

When Henry VIII obtained his notorious divorce from Katherine of Aragon he obtained a decree annulling his marriage on the ground that his spouse was within the prohibited degrees. His case would have been sound enough had he not previously obtained a dispensation enabling him to contract the marriage he later disclaimed.

Even today the layman has not a clear idea of the distinction between divorce and nullity although to the theologian and the lawyer the two are poles apart. To the lawyer the difference is plain between that which is void or voidable from the beginning and that which is valid but can be destroyed by reason of a subsequent cause.

This distinction has, however, been clouded by the recent introduction of so-called nullity based upon refusal to consummate the marriage which appears to be a subsequent event although no doubt the contrary is arguable.

I propose to confine myself in the main to divorce and its incidents and to draw attention to some developments of the law which may be said to have caused difficulty or to have produced interesting or unexpected results.

### DIVORCE AND THE INSTITUTION OF MARRIAGE

The law of divorce has been administered not only in accordance with ecclesiastical tradition but also against the background of the common law in its recognition of the duties of husband and wife towards each other.

Proceedings for divorce are treated as litigation involving rights and remedies in respect of injuries suffered. This was true at any rate until 1937 when for the first time Parliament introduced two new grounds for divorce, one of which, 'insanity,' carries no stigma of guilt and the other, 'presumption of death,' which may well be equally innocent.

In view of recent events culminating in the Report of the Royal Commission on Marriage and Divorce in 1956, this departure from what had until then been accepted as normal may be the forerunner of a new approach to divorce; for there is a large body of opinion in this country which is not affected by religious or traditional considerations and which now regards the conception of divorce as a remedy for a wrong inflicted as outdated and totally unsuited to the needs of the community. What is wanted, it is said, is some system of allowing marriages to be ended because and only because they have broken down, not because either or both parties are to blame.

The State would, in my opinion, be unable to exercise any effective control over a system of such a kind. Its advocates would no doubt seek to work this scheme with the assistance of some official who would presumably have no other function but to register the decision of the spouse who claimed that his or her marriage had hopelessly broken down. Judges would not be required for they would have no judicial function to perform.

This approach to the problem gives insufficient weight to the institutional aspect of marriage and leads logically to the system tried and now abandoned in Soviet Russia. Having freed themselves from the shackles of religion and tradition, they set about the task of reforming the marriage laws with relentless logic. Marriage, like birth and death, was an event which occurred. Marriage began when two persons intended it should begin and ended when either or both intended it should end. Registrations of births, deaths and the beginnings and endings of marriage were convenient for record purposes but did not have any bearing on the facts except as records.

This approach has now been abandoned in the U.S.S.R., where an attempt is now being made to preserve the family as a unit. If the experiment tried had been followed to its logical conclusion the family unit must have tended to disappear and the structure of society might eventually have reverted to the matriarchal form, the earliest form of society known to jurists.

Divorce law as we know it represents an attempt to find a *via media* between the school which believes that the maintenance of the family unit is so important that the bond can only be dissolved by death and the school which regarded marriage as at best an institution of a temporary nature analogous to that of partners in a business firm.

The law of marriage is based on the principle that marriage is the voluntary union of one man and one woman for life to the exclusion of all others. It is not in itself a contract which is subject to defeasance as an ordinary civil contract by the repudiation of one party accepted by the other or by frustration. It is a status founded upon a contract to marry but in theory at any rate it is a permanent union.

When promises are exchanged and result in marriage they are not of the sort satirised by Jonathan Swift who said promises and piecrust are made to be broken. The intention is that the promises should be kept however difficult it may be. 'He that sweareth unto his neighbour and disappointeth him not though it were to his own hindrance.' There is often plenty of hindrance to those who have made promises resulting in marriage.

The modern tendency is to take the line that recognition may still be given to the view that marriage is an institution because of the children whose interests have to be considered but that, provided the interests of the children can be reasonably safeguarded or where there are no children, marriage as such is properly to be regarded not as an institution but as no more than a temporary alliance.

The emancipation of woman from bondage to her husband has been discussed recently in a book published by dons of King's College, London, who find much that is to be praised in the process but as the Master of the Rolls in his Foreword[1] has pointed out, this conception has gone hand in hand with a headlong rush for divorce. This has gathered momentum throughout the years gaining impetus from the national calamities of the two world wars.

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[1] R. H. Graveson and F. R. Crane, *A Century of Family Law, 1857–1957*, 1957, pp. vii *et seq.*

Having now completed a century of divorce, many minds have been occupied in reviewing the history and development of the law and since I wrote this paper I have had the opportunity of reading the striking and scholarly review of divorce jurisdiction contained in Mr. O'Sullivan's paper [1a] which puts the case against divorce both from the Christian and the utilitarian point of view. *The Times* correspondence columns have contained letters for and against divorce which followed the publication of the book edited by Professors Graveson and Crane of King's College, London, to which I have already referred.

One of the latest letters was in these terms—

> 'The crux of the divorce problem is essentially a moral one. Certainly we have a right to individual freedom, but when we marry we deliberately merge our will, as well as our body, with that of our partner, for a common purpose, the foundation of a happy family. We are all selfish: since the time we were born we have been fighting, consciously or unconsciously, for our own way, to have what we want. Some people, either by religious training or natural goodness, manage to keep this under control. The majority do not; hence wars, slavery in all its forms, and the prevalence of divorce.
>
> 'In the happiest of marriages there are often occasions when the two wills are bitterly opposed. If the opportunity to have your own way or your own pleasure presents itself in the form of easy divorce the temptation is very great, and the problem is not seen in its true perspective. It may seem to be all on one side, one partner continually giving way to the other, living a kind of martyrdom. Never mind, swallow your pride, remember He was "humble of heart"; keep on giving, not as a martyr but as a free gift, and you will get your reward, not only in Heaven but on this earth as well, in the form of a happy marriage and family.' [1b]

I now turn from the general aspect to one or two developments of the law.

### THE RIGHT TO 'MAINTENANCE'

Curiously enough although her emancipation is in most respects complete for a wife can contract, trade, enter the professions, own

[1a] See below, pp. 12 *et seq.*

[1b] *The Times,* January 26, 1957.

property, commit a crime in her husband's presence without being deemed to be coerced by him, yet in matters of maintenance things are in principle very much as they were before her emancipation and in tax matters the law substantially preserves the old common law unity of husband and wife. Her income is part of his for this purpose to the disadvantage of both.

This right to 'maintenance' and the income tax incidence thereof is of immense practical importance to many thousands of people of both sexes.

At common law a man is bound to maintain his wife unless she forfeits her claim by her adultery (unless instigated by him) or suspends her right by desertion without cause. So long as that desertion continues she can make no claim.

The Ecclesiastical Courts provided for alimony in appropriate cases and enforced their orders after Decrees of Divorce *a mensa et thoro* had been pronounced.

When the Matrimonial Causes Act, 1857, was passed it provided for maintenance to be paid after divorce following the principle adopted in the Ecclesiastical Courts but took no account of the fact that in case of divorce there could be remarriage—hitherto impossible unless Parliament had dissolved the marriage by Private Act.

When divorce thus became subject to the jurisdiction of the courts the number of petitioners was small. The number remained almost infinitesimal by modern standards until the Great War of 1914–18. Few contemplated divorce proceedings and most preferred to suffer together with or apart from partners against whom they might have a remedy. The idea of a scandal in the family was abhorrent to nearly all and only a few relatively well-to-do persons resorted to the courts.

In those days no great trouble seems to have followed in enforcing orders for maintenance made in favour of successful wives against their husbands following upon divorce.

Now all this is changed and although the law is supposed to be the same for rich and poor alike, the incidence of maintenance orders varies greatly. It is quite common for a husband to be divorced and to marry again, sometimes four or five or more times. The evening papers publicise the man who marries for the seventh time as of equal news value to the breaker of an Olympic record.

Since man and wife living together are taxed as one they pay more tax than if they were two single persons sharing a house, especially if each is able to earn an income.

After a divorce the man who is ordered to pay maintenance is separated for tax purposes from his ex-wife and can deduct the amount of maintenance from his income for surtax purposes and repeat this exercise each time he is divorced so that the surtax payer with a gross income of £10,000 or more a year is little worse off financially after his third or fourth journey through the Divorce Court than he was at the beginning.

So much for the rich divorcees. At the other end of the scale the position is the opposite. A weekly wage earner who is divorced and ordered to pay maintenance is equally permitted to remarry but he thereby accepts the legal responsibility to support the subsequent wife and the courts are quite unable adequately to protect the interests of the original wife. The new wife often if not always takes the wage packet and has the disposal of the bulk of it. There simply is not enough money to go round and sooner or later the abandoned spouse is likely to give up the fruitless struggle to enforce her order. The flouting of court orders brings the court into disrepute.

The right to maintenance would find its chances of survival difficult if not impossible if it were to be kept alive upon marriages being brought to an end without regard to injuries suffered.

The advocates of divorce for all comers have not overlooked the probable desire of many wives to have their financial future assured after divorce but, if breakdown of marriage is the ground for divorce, there will be no need for any other grounds and it will be difficult to see on what principle the right to maintenance after divorce is to be sustained.

So far as I can see practical difficulties in allotting and enforcing maintenance could only be avoided by abolishing maintenance of ex-wives altogether. In Scotland this, I think, has always been the position. The legal effect of divorce there is to treat each spouse as having died in the lifetime of the other with automatic consequences in the cases of intestacy and existing settlements.

Before leaving the question of maintenance it is worth noting that by a decision of the House of Lords in *Hyman* v. *Hyman*,[2] it has been held that a wife cannot contract out of her right to maintenance after divorce. Although the speeches in that case went further than it was necessary for the determination of the actual issues there involved the decision has been treated as establishing the proposition I have stated.

---

[2] [1929] A.C. 601.

Of late the principle has been carried even further so as to cover maintenance provisions made by deed where there is no divorce. The history of this matter is briefly as follows: before 1879 deeds of separation were considered void as against Public Policy having been so treated by the Ecclesiastical Courts. Since *Besant* v. *Wood*[3] was decided in 1879 agreements providing for an immediate separation have been held good and until recently were frequently entered into containing (*inter alia*) provisions for the maintenance of wives.

A recent decision of the Court of Appeal in the case of *Tulip* v. *Tulip*[4] has, however, made such deeds virtually useless to husbands since it has been held that a wife is not bound by a covenant to accept a fixed allowance from her husband even apart from divorce proceedings and is at liberty to sue him for maintenance notwithstanding her covenant to the contrary. Since the main object of separation agreements is usually to provide for maintenance this decision has destroyed the *raison d'être* of these documents and I doubt if any husband in receipt of legal advice would now be well advised to sign one.

I have so far discussed the way in which Parliament had dealt with maintenance in divorce proceedings working upon the foundation of the common law rule that a husband is liable for his wife's maintenance and the practice of the Ecclesiastical Courts in proceedings for divorce *a mensa et thoro*. After judicial separation, the successor of divorce *a mensa et thoro*, alimony has been ordered by the courts on the same lines.

This does not cover the whole field of maintenance. Where there have been no proceedings for divorce or for judicial separation or its earlier equivalent the position of the wife as to maintenance has developed comparatively slowly.

The common law did little for her. If she were deserted she might obtain help from a compassionate relation or friend or from a benevolent baker who might provide her with bread.

---

[3] (1879) 12 Ch.D. 605.

[4] [1951] P. 378.

Her benefactors might recover from the husband the cost of the necessaries which they had provided for her but she had no right to make a direct claim against her husband.

Where no cruelty or adultery could be proved the Ecclesiastical Courts would not help her either. The remedy was to make an order for restitution of conjugal rights which, if disobeyed, resulted in the contumacious husband being excommunicated. By the Ecclesiastical Courts Act, 1813, imprisonment for not more than six months was substituted for sentence of excommunication.

Neither of these punishments produced maintenance for the deserted wife.

Restitution proceedings survived the passing of the Matrimonial Causes Act, 1857, and still survive but it was not until 1884 that Parliament provided for the maintenance of the deserted wife whose husband had failed to obey a Decree of Restitution of Conjugal Rights. This maintenance was given the name of 'periodical payments' and could be secured for the joint lives of the parties.

The Matrimonial Causes Act of 1857 had, it is true, introduced a new matrimonial offence of desertion for two years and upwards, upon proof of which judicial separation might be pronounced in the same way as upon proof of adultery or cruelty; alimony followed; but this did not fill the gap of two years which had to elapse before proceedings were taken.

The Summary Jurisdiction Acts from 1878 onwards opened the way to those who were not able to afford access to the High Court and deserted wives could and can obtain maintenance orders enforceable before Courts of Summary Jurisdiction. The latest step in this direction was taken as lately as 1949 when Parliament, for the first time, enabled wives to obtain maintenance from the High Court in cases where, in the language used by Parliament, there was 'wilful neglect to maintain,' without having first to obtain an order for Restitution of Conjugal Rights and to prove disobedience to that order.

Thus curiously enough where a wife has been able or willing to take divorce proceedings or proceedings for judicial separation she has been until recently, from a financial point of view, a step ahead of the deserted wife who could not or would not take such proceedings against her erring spouse.

### THE DOCTRINE OF 'REVIVAL'

Another feature of divorce law which is of peculiar interest in its development in this country is the doctrine of 'Revival' as applied to offences which have been condoned. In contrast to the law relating to maintenance which has to a great extent developed through the media of legislation the law of revival is judge made.

Condonation may be stated briefly to be the remission of an offence by implication. It is to be found in Military Law and Divorce Law but not elsewhere in our legal system.

Condonation in divorce law is a direct importation from the canon law administered formerly by the Ecclesiastical Courts. It is not the same thing as forgiveness although the necessity for forgiveness as an essential element has frequently been stated.[5]

One distinction between forgiveness and condonation is that forgiveness may take place by word of mouth or by the writing of a letter but without the reinstatement of the offending spouse there is no condonation. Another distinction is that forgiveness blots out the offence but condonation, as it has developed in our law, does nothing of the kind because of the application of the revival doctrine. The offending spouse is only conditionally forgiven. He is, as it were, bound over to be of good behaviour and if he does not behave as it has been said 'with conjugal kindness' he may be called to account for earlier misdeeds however long a time has elapsed. If the hatchet is buried the grave is a very shallow one as Vaisey, J., pointed out in his dissenting judgment in *Beard* v. *Beard*.[6] This was a case where the Court of Appeal by a majority decided that condoned adultery might be revived by desertion although the desertion had not lasted for the period of three years necessary to found a petition for divorce.

The offence condoned may be revived by any serious misbehaviour, not only by another offence of the same kind as that which has been condoned, and unless the parties enter into an agreement by which they bind themselves by covenant not to dig up the ugly past, the law will not save them. Such an agreement was entered into in the case of *Rose* v. *Rose*,[7] affirmed on appeal in the next year. A compromise by deed is therefore more far reaching than condonation which is liable to be destroyed by revival.

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[5] *Beeby* v. *Beeby* (1799) 1 Hag.Ecc. 789, at p. 793.

[6] [1946] P. 8.

[7] (1882) 7 P.D. 225.

The severity of the doctrine of revival has been noticed by Denning, L.J., who said he thought in the case of long standing condonation of an old offence revival ought to be more difficult than in a case where the offence was recent but I do not think there is any legal basis for the mitigation of the doctrine.

As Vaisey, J., pointed out in *Beard* v. *Beard*[8] there seems to be something almost inhuman in a law which enabled a wife or a husband to obtain as of right a divorce from the other in their old age upon the ground of one single act of adultery committed by the other in the time of their far off youth and immediately condoned but now raked up from the past upon some petty provocation insufficient in itself to be a ground for the relief so tardily sought. No statute of limitation applies to such a case, no plea of acquiescence and delay or unreasonableness could avail, nor could the court draw any distinction between a single act of adultery committed under exceptional temptation and a series of such acts of a really heinous character.

In speaking of provocation Vaisey, J., used the adjective 'petty' and perhaps there he went too far for the majority of the court lent no countenance to the view that an act sufficient to revive a condoned offence could be of a trivial nature.

Nevertheless the position of the spouse whose offence is condoned is indeed a precarious one.

Take the common example of condoned adultery revived by desertion for less than the three years necessary to found a petition for divorce in itself. In such cases the desertion may be of very short duration but once it has occurred the deserting spouse cannot undo what he has done. The deserted spouse need not receive back the erring partner but can proceed hot foot to file a petition based on the condoned offence.

Revival finds no place in the works of high authority such as Ayliffe's *Parergon* (1726) or Oughton's *Ordo Judiciorum* (1738) although in the eighteenth century it had already reared its head in the Ecclesiastical Courts of this country.

In *Worsley* v. *Worsley*[9] Dr. Bettesworth, Dean of Arches, held that adultery condoned could be revived by cruelty. Sir William Scott (afterwards Lord Stowell) in 1794 sitting in the Consistory Court in *D'Aguilar* v. *D'Aguilar,*[10] and Sir John Nicoll, Dean of Arches, in *Durrant* v. *Durrant*[11] in 1825, were of the same opinion.

---

[8] See *supra,* n. 6.

[9] (1730) 2 Lee 572.

The Matrimonial Causes Act, 1857, made no mention of revival but the interpretation of condonation as conditional forgiveness liable to be defeated by revival was adopted by the new court established by the Act.[12]

*Beard* v. *Beard* has established that revival may take place even though the offence alleged to create the revival is not of itself a ground for Divorce and the law of revival is now securely entrenched as part of the judge made law of England.

It does not on the other hand form part of the law of Scotland. There condonation is final and unconditional and therefore approximates more closely to forgiveness in the ordinary sense of the word. No question therefore of the revival of one offence by another can arise. In cases of cruelty the question of revival does not strictly arise. In one sense it may be said that in such cases condonation of first acts is natural but proof of these acts is essential in order to complete the picture drawn in part by the description of a culminating act which by itself might not be sufficient proof of cruelty. I think the position is that in Scotland proof of earlier acts is therefore admitted as of evidential value irrespective of any question whether the earlier acts have in themselves individually or collectively been condoned.

In this paper I have dealt with two subjects, 'maintenance' and 'revival' which have no particular relation to one another except that they form interesting features in the law administered in the Probate, Divorce and Admiralty Division of the High Court in its dealing with disputes between husband and wife.

I have selected these topics as illustrations of the way in which the law has developed for good or ill, whether by the unaided efforts of the judiciary or by the activity of the legislature where the courts are unable to proceed unaided in the necessary task of development.

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[10] 1 Hag.Ecc. 773.

[11] 1 Hag.Ecc. 733.

[12] See *Dent* v. *Dent* (1865) 4 Sw. & Tr. 105.

## 2

# A CENTURY OF DIVORCE JURISDICTION (1857–1957)

RICHARD O'SULLIVAN

A CENTURY ago, in the month of January 1857, there was in England no court having jurisdiction to make a decree of dissolution of marriage.

### MARRIAGE AND DIVORCE BEFORE 1857

'Before 1857,' said Lord Dunedin, 'the law of England is that an English marriage is indissoluble by any court; it is something that cannot be broken; indissoluble in essence.'[1] 'It was only in obedience to the so to say brute force of a statute,' added Lord Phillimore, 'that they submitted to recognise a dissolution.'[2]

In a subsequent case in the House of Lords, Lord Russell of Killowen gave, from a different angle, a rapid sketch of the history of English marriage. 'My Lords, when England was a Catholic country, matrimony was a sacrament conferred upon them by the spouses. This sacramental nature of marriage, the holy estate of matrimony, was the basis of the civil law of Europe with regard to it. When, in the reign of Elizabeth, England abandoned the old faith and became a Protestant country, matrimony ceased according to the new dispensation to be ranked among the sacraments of the Gospel. The twenty-fifth of the *Thirty-nine Articles* so provided. The status of marriage became the product or result of a contract between the parties. But the obligations resulting from the status, the solemnity of the status, the importance to a civilised community of its maintenance, remained almost unimpaired.[3] Until the first Divorce Act in

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[1] *Salvesen* v. *Administrator of Austrian Property* [1927] A.C. 641 at 661.

[2] *ibid.*, p. 664.

[3] 'When the Reformation came,' said Lord Campbell, 'the courts denounced the doctrine of a sacrament in marriage, retaining the idea of its being of Divine Institution in its general origin; but considering it in the light of a civil contract, which for its full completion had always required in England at least some religious solemnity' (*Report of Royal Commission on the Law of Divorce* (C. 1604–1853), p. 3). And Blackstone adds that

1857 the marriage tie was indissoluble except by legislation.'[4]

In fact, the Reformation in England turned largely on a matter of marriage, of the first marriage of Henry VIII with Queen Catherine, and of his second marriage with Anne Boleyn. At his trial for treason, Sir Thomas More protested after verdict: 'It is not for this [Royal] Supremacy so much that ye seek my blood as for that I would not condescend to the marriage.'[5]

The Statute of Appeals enacted in 1533–34 was the necessary complement of the King's marriage with Anne Boleyn and of the divorce (that is to say, the nullity) proceedings against Catherine before Cranmer. In the preamble to the statute the King (now claiming to be an emperor) sketched with his own hand the relations that were to exist between the Imperial Crown and that which Professor Holdsworth calls 'the new Anglican Church.'[6] The King Emperor was to be supreme in all matters and causes ecclesiastical as well as civil. 'But,' adds Maitland, 'the great breach of continuity has yet to be noted. The academic study of the canon law was prohibited. No step that Henry took was more momentous. He cut the very life-thread of the old learning [and] . . . encouraged and endowed the study of "the civil law" and the unhallowed civilian usurped the place of the canonist on the bench. The significance of this change is sometimes overlooked. . . . The theory of Church and State which the civilian found in his books was the imperial papalism, the *Cäsaro-Papismus,* of Byzantium.'[7]

---

the Common Law, which follows in this case the Canon Law of the Church 'deems so highly and with such mysterious reverence of the nuptial tie, that the causes of divorce (*a mensa et thoro*) are purposely limited to a few extreme and specific provocations' (*Commentaries,* Vol. 1, p. 440).

This attitude of English lawyers to marriage in its natural, and apart from its sacramental, character is not unlike the view of the Roman jurist Modestinus, whose definition of marriage seems to show that it extended beyond merely civil effects, to the moral and religious life of the partners: *'Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio'* (Dig. 23. 2). The language of Modestinus is repeated in the Encyclical *Casti Connubii* (1930) of Pope Pius XI. In an earlier Encyclical *Arcanum Divinae Sapientiae* (1880), Pope Leo XIII, citing Pope Innocent III, had written: *'Apud fideles et infideles existere sacramentum conjugii.'*

[4] *Fender* v. *Mildmay* [1938] A.C. 1 at 27–8.

[5] N. Harpsfield, *The Life and Death of Sir Thomas More* (E.E.T.S., 1932), p. 196.

[6] *A History of English Law,* Vol. 1, p. 591.

[7] *Roman Canon Law in the Church of England,* pp. 92–4. At Oxford one of the first occupants of the new Chair of Roman Civil Law was Alberico Gentile who 'hated the Canon Law as a thoroughbred civilian

A series of statutory proposals for the codification of the 'King's Ecclesiastical Law of the Church of England' having come to nothing, the interim arrangement remained by which Parliament directed that canons, constitutions, ordinances and synodals provincial being already made 'which be not contrarient or repugnant to the law, statutes and customs of this realm, nor to the damage or hurt of the King's Prerogative and other ecclesiastical laws or jurisdictions spiritual as be yet accustomed and used here in the Church of England' were to continue in force.[8] By authority or statute some parts of the old canon law remained; other parts were abrogated; no one attempted to disentangle the parts that were in force and the parts that were no longer binding. A proposed Code of post-Reformation canons known as the *Reformatio Legum Ecclesiasticarum* produced finally in 1571 by Foxe with the permission of Archbishop Parker was not approved by Convocation or the Queen or Parliament.

### THE ECCLESIASTICAL COURTS

The early Protestant Reformers did in fact claim or assume that a decree of divorce obtained in the Ecclesiastical Courts of our Lord the King on the ground of adultery had the full effect of a divorce *a vinculo*. In the *Marquis of Northampton's* case, in the reign of Edward VI, a Court of Delegates—now of the King, no longer of the Pope—pronounced in favour of a second marriage after a decree of divorce *a mensa et thoro*. And the articles on marriage and divorce in the *Reformatio Legum Ecclesiasticarum,* which had been prepared by a sub-committee of eight persons out of thirty-two nominated by statute, proposed to allow as grounds for divorce *a vinculo* absolute desertion, protracted absence, mortal enmities and lasting cruelty. The Articles favoured reconciliation whenever it could be obtained; separation from bed and board (*a mensa et thoro*) was to be entirely abolished.[9] After a period of confusion, in 1602

should hate it.' In his work *De Nuptiis* (Hanoviae, 1614) he speaks his mind of the books of Canon Law: *'Flammis, flammis libros spurcissimos barbarorum, non solum impiisimos anti-Christi! Flammis omnes, flammis!'* (cited in Maitland, *op. cit.*, p. 95).

[8] 27 Hen. 8 (1535–36), c. 15.

[9] The Puritan origin of the articles appeared in the proposal that adultery should be punished by perpetual imprisonment and transportation for life.

Archbishop Bancroft sitting in the Star Chamber held in *Foljambe's* case that a sentence of divorce in the Ecclesiastical Courts of our Lord the King did not effect a dissolution *a vinculo*.

Over the law of marriage and divorce (*a mensa et thoro*) the Ecclesiastical Courts of our Lord the King had complete control until 1857. Their jurisdiction comprised suits for nullity, either when the marriage was void *ab initio* or when it was voidable. In the case of a marriage which was pronounced to be void *ab initio*, the parties were said to be divorced *a vinculo matrimonii*. A divorce *a mensa et thoro* was granted on grounds of adultery or of cruelty. For desertion, the appropriate remedy was a suit for restitution of conjugal rights, disobedience to which entailed a sentence for contumacy and excommunication. A suit for jactitation of marriage might be brought against a person who falsely asserted or boasted that he or she was married to another. The sentence of the court enjoined that such a person should keep perpetual silence.

The practitioners and judges who administered the ecclesiastical law of our Lord the King, including the law of marriage and divorce, were drawn from an unofficial body or association of doctors of law and advocates of the Church of Christ at Canterbury which came to be known as Doctors' Commons. Admission to Doctors' Commons was regulated by the Archbishop of Canterbury, and the institution offers points of similarity with the Inns of Court and the Serjeants Inns. The members of Doctors' Commons had a monopoly of practice in the courts administering the ecclesiastical and the civil law, but instruction in the civil law was left to the universities, a degree at one of which was a condition precedent to admission to practice.

The attitude of the Ecclesiastical Courts at the turn of the nineteenth century to the separation of the spouses by divorce *a mensa et thoro* is illustrated by a judgment of Lord Stowell:

> 'Though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility. When people understand that they must live together except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot

> shake off; they become good husbands and good wives from the necessity of remaining husbands and wives, for necessity is a powerful master in teaching the duties it imposes. If it were once understood that, upon mutual disgust, married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness, in a state of most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.'[10]

Within the limits imposed by the *graviores leges* of statute and of common law, the substance of the old canon law was still regarded. In appropriate cases advocates and judges referred to the *Decretum* and the *Decretals*; and to the commentaries of English and foreign canonists of the pre-Reformation and of the post-Reformation time.[11] The catalogue of the Library of Doctors' Commons ran in 1819 to 236 pages of books of the Roman civil and the Roman canon law. At the confirmation of his election it was the custom for every English bishop to give a subscription for the purchase of fresh books.

### DIVORCE BY PRIVATE BILL

Meanwhile, towards the end of the seventeenth century, a practice had sprung up of petitioning for a divorce by Private Bill in Parliament. On the petition of Lord Roos, in the reign of Charles II, an Act was passed bastardising the children of Lady Ann Roos by reason of her adultery, and this was followed by a decree of separation *a mensa et thoro* in the spiritual court; and a Bill was brought in intituled 'An Act for Lord Roos to marry again,' giving the children born in such wedlock the character of legitimacy and the capacity to inherit. In practice, such Bills were introduced in the House of Lords and the circumstances of each case were strictly examined. Before 1715 only five such Bills were known. Between 1715 and 1755 there were sixty; between 1775 and 1800 there were seventy-four; between 1800 and 1850 there were ninety such Private Acts. As a condition precedent to presenting each petition for a Bill in the Lords it was necessary to have obtained a decree *a mensa et thoro* from the Ecclesiastical Courts, and to have recovered damages against the adulterer in an action for criminal conversation in a Court of Common Law. To comply with Standing Orders any Bill to disallow a marriage on the ground of adultery had to contain a clause prohibiting the inter-marriage of the offending parties. This clause was regularly struck out in Committee or on Report.[12]

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[10] *Evans* v. *Evans* (1790) 1 Hagg. Const. 35 at 95.

[11] Thus in *Aston* v. *Wild* (1731) 2 Lee 580, the law in a nullity suit was taken from the *Decretals* of Gregory IX and the *Decisiones Sacrae Rotae Romanae* (Venice, 1726). In *Keats* v. *Keats* (1859) Sw. & Tr. 334, the court expressed its 'deference' to the opinion of Sanchez († 1610) who is in fact cited in a note on the first page of the Report of the Royal Commission on the Law of Divorce, 1853; and again by Lord Birkenhead in *C.* v. *C.* [1921] P. 399 at 400, who reaches Aquinas and Albertus Magnus through Sanchez. *Cf.*, *Canon Law in the Church of England* (S.P.C.K., 1947), pp. 48–9.

The threefold process of proceeding in the Ecclesiastical Court and in the Court of Common Law and once more in Parliament was slow and expensive and possible only to the rich. It was illustrated and satirised in a celebrated address by Mr. Justice Maule in 1843 to a hawker, convicted of bigamy, who urged in mitigation that his lawful wife had long ago left her home and children to live with another man:

> 'I will tell you what you ought to have done under the circumstances and if you say you did not know, I must tell you that the law conclusively presumes you did. You should have instructed your attorney to bring an action against the seducer of your wife for damages: that would have cost you about £100. Having proceeded thus far you should have employed a proctor and instituted a suit in the Ecclesiastical Courts for a divorce *a mensa et thoro*: that would have cost you £200 or £300 more. When you had obtained a divorce *a mensa et thoro* you had only to obtain a Private Act for a divorce *a vinculo matrimonii*. The Bill might possibly have been opposed in all its stages in both Houses of Parliament, and altogether these proceedings would cost you £1,000. You will probably tell me that you never had a tenth of that sum, but that makes no difference. Sitting here as an

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[12] When the Bill came to the House of Commons there was a functionary called 'the Ladies' Friend' whose duty it was to see that a husband petitioning for divorce made some suitable but moderate provision for the offending wife. The intended provision was not included in the Bill but care was taken that it was legally secured to the wife before the Bill passed through Committee.

> English judge it is my duty to tell you that this is not a country in which there is one law for the rich and another for the poor.'[13]

The language of Mr. Justice Maule may seem in some measure to reflect the spirit of the current utilitarian philosophy. According to Professor Holdsworth, the utilitarians were as much opposed to Christianity as Tom Paine. Like him they approved an anti-Christian set of ideas. Attacks were made by Bentham (among others) on the Church Catechism and the Church of England; and on St. Paul, who was thought to be responsible for dogmatic theology and therefore for the Catechism. Religion, and especially religion as taught by the Church of England, was regarded as one of those sinister influences which impeded the spread of the true gospel of Utilitarianism. The policy of the leaders was not openly to attack theology but rather to ignore it.[14] In April 1844 John Stuart Mill, writing to Auguste Comte, outlined the programme:

> 'Le temps n'est pas venu où, sans compromettre notre cause nous pourrons en Angleterre diriger des attaques ouvertes contre la théologie même chrétienne. Nous pouvons seulement l'éluder, en l'éliminant tranquillement de toutes les discussions philosophiques et sociales et en passant à l'ordre du jour sur toutes les questions qui lui sont propres.'[15]

The new spirit which was now abroad will perhaps explain the provisions of the Marriage Act of 1835–36 which allowed the celebration of marriage without any religious ceremony, in the presence only of a registrar.

## THE ROYAL COMMISSION, 1850–53

In the year 1850 a Royal Commission was appointed to inquire into the present state of the law of divorce and more particularly into the mode of obtaining divorces *a vinculo matrimonii.* The Commissioners were Lord Campbell, the Rt. Hon. Stephen Lushington, Doctor of Civil Law, Lord Beaumont, Lord Redesdale, Spencer Walpole, Q.C., and William Page Wood, Q.C., and one layman, Edward Pleydell-Bouverie. Only two witnesses were examined. The inquiry was mainly directed 'to the substitution of a proper legal tribunal for the procedure by Private Acts of Parliament' in cases where a divorce *a vinculo* was sought. According to Lord Campbell, the object of the Commissioners was not to alter the law but only the procedure by which the law was carried into effect. With one dissentient, they recommended that one tribunal (subject to an appeal) would be sufficient.[16]

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[13] Cited in Holdsworth, *A History of English Law,* Vol. 1, p. 623. For having pretended to be a bachelor and so deceived an honest woman and induced her to live with him and done her wrong, he was sentenced to hard labour for four months which the judge hoped would be a warning to people who trifled with matrimony.

[14] *A History of English Law,* Vol. XIII, pp. 114–17.

[15] Cited in Philip Hughes' *The English Catholics* (1950), p. 5, n. 3.

## THE BILL OF 1857 BEFORE PARLIAMENT

The Report of the Royal Commission of 1850–53 led in due course to the legislation of 1857. In introducing the Bill in the Lords, Lord Cranworth, Lord Chancellor, stated that its main object was to constitute a court which should be competent to decree as a matter of right that relief (divorce *a vinculo*) in favour of persons who had just matter of complaint, which could now only be obtained by means of an Act of Parliament. The aim of the Bill was to do away with the remedy of private legislation for such persons only as could afford to obtain a divorce by Act of Parliament.[17] The Archbishop of Canterbury 'did not hesitate to support the main object of the bill,' and thought an 'injured wife or husband . . . ought not to be denied the relief which the Bill affords.' The clause which permitted the guilty parties to remarry he could 'neither reconcile . . . to reason nor to the Divine Command.'[18] Lord Redesdale, opposing the whole Bill, pointed out that under the existing order each divorce was a separate and distinct piece of legislation. It could not be considered part of the general law.[19] An amendment, moved by Lord Wensleydale disallowing the inter-marriage of the guilty parties, was defeated on a division. Lord Lyndhurst, who argued that the *Reformatio Legum* was a body of authority not to be resisted, moved an amendment that wilful desertion for a period of five years should be a ground for divorce *a vinculo*.[20] This was heavily defeated, the Lord Chancellor stating that in legislation they ought to act on the spirit and the principles to be justly derived from Scripture.[1] In answer to an inquiry, the Lord Chancellor stated that, as Ireland and England enjoyed separate judicial systems, it was not possible to have one common divorce tribunal for England and for Ireland. It was their intention as soon as they got the sanction of the legislature for such a measure for England, to introduce a similar measure for Ireland.[2] As it turned out Ireland never had the benefit of such a measure.[3]

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[16] Lord Redesdale dissented and the Report contains what is quaintly called a 'statement of his Reasons for *not entirely concurring* in the Report' (italics supplied). On the basis of his interpretation of the Gospel of St. Matthew, and of the First Epistle of St. Paul to the Corinthians, Lord Redesdale thought marriage was indissoluble and that it was expedient 'that the law of England which now holds the marriage tie to be indissoluble should remain unaltered; and that the practice of passing exceptional laws in favour of particular cases should be discontinued' (*Report of Royal Commission on the Law of Divorce*, 1853, pp. 23–6).

By a strange coincidence, the year (1850), which saw the appointment of the Royal Commission on Divorce, saw also, with the restoration of the Roman Hierarchy in England, the return of the Roman Canon Law. During the debates on the Ecclesiastical Titles Assumption Bill in 1851, the Solicitor-General (speaking in the presence and with the assent of the Prime Minister) said that the Bill before the House would not shut out the Canon Law. And Gladstone warned members who were going to vote for the Bill because they were afraid of the Canon Law, that it had not the slightest tendency to shut out the Canon Law.

[17] *Parl. Deb.*, Third Series, Vol. 145, cols. 483 *et seq.*

In the House of Commons the Attorney-General, Sir Richard Bethell, declared[4] that the Bill involved only long existing rules and long established principles, and was intended to give only a local judicial habitation to doctrines that had long been recognized as part of the law of the land, and administered in a judicial manner although through the medium of a legislative assembly.

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[18] *ibid.*, col. 828. The Lords Spiritual were deeply divided on the Bill. The Bishop of Oxford thought it was unfair to rely upon or refer to the *Reformatio Legum Ecclesiasticarum.* Citing Burke, he said it had been the wisdom of every Christian legislature to add every conceivable safeguard to the purity of marriage. The Bill proposed to declare it to be the right of every Englishman to have that relief which was now available only in individual cases where the legislature interfered by exceptional action (*ibid.*, col. 528). The Bishop of Lincoln wished the adulterer to be put in the criminal dock by the side of the forger and the burglar. The people should be made to understand that adultery was a crime against the laws of man as well as against the laws of God (*ibid.*, col. 537).

[19] *ibid.*, col. 515.

[20] *ibid.*, cols. 815 *et seq.*

[1] *ibid.*, cols. 817 *et seq.*

[2] *ibid.*, col. 798.

[3] Under the Constitution of the Irish Republic, 1937, Article 41 provides:
1. The State pledges itself to guard with special care the institution of marriage on which the family is founded and to protect it against attack.
2. No law shall be enacted providing for the grant of a dissolution of marriage.

[4] *Parl. Deb.*, Third Series, Vol. 147, cols. 718 *et seq.*

Bills for divorce *a vinculo* originated in the House of Lords and came down to the Commons sanctioned by the high authority of Lords Spiritual and Temporal of the realm. Since 1703, there was no recorded instance of any bishop objecting in Parliament to the passing of any one of these Bills on the ground that marriage by the law of England was a thing indissoluble and that this was according to the rule of Scripture. Could they for a moment listen to the argument that they were about to fly in the face of Scripture when they found that their bishops, age after age, had been parties to the passing of these Bills, and when the two Houses of Parliament had in all these instances recognised the very rule of law which was now embodied in the Bill? An amendment directed to making the position of a woman the same as that of a man in regard to grounds of divorce was met (and defeated) by an argument that the House was limited to the performance of a single task, namely, the setting up of a new tribunal with a duty to administer existing principles of law.

As to the inter-marriage of guilty parties the Attorney-General argued[5] that if it were right and proper as it had hitherto been that the guilty parties should be permitted to marry and if that rule were to remain the law of the land he hoped that the House of Commons would never for one moment listen to the desire of the clergy of the Church of England to be relieved from the obligation of obeying the law of the land: that was the true notion of the supremacy of the Crown.

In his argument the Attorney-General referred[6] to the different renderings and interpretations of the Greek text of St. Matthew; he was answered by Gladstone, the protagonist of the Opposition in the Commons, who vehemently protested against one of the most degrading doctrines that can be propounded to civilised men namely that the legislature has power to absolve a man from spiritual vows taken before God.[7] The

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[5] *ibid.*, cols. 731–2.

[6] *ibid.*, cols. 727 *et seq.*

[7] *ibid.*, cols. 827–32, 833–56. One may read with interest a letter in *The Times* of March 17, 1951, in which Sir Stephen Henn-Collins, sometime judge of the Divorce Division, stated: 'The all too common assumption that a decree of divorce wipes out all bonds, spiritual as well as legal, probably stems from the fact that a church marriage imposes both; and the inference that when the "marriage" is dissolved all ties are likewise dissolved is perhaps natural but is certainly wrong. The Divorce Court does not and does not purport to absolve from their vows those who have taken them.'

Irish members also joined with zest in the theological debate the issue of which could naturally be foretold since it depended on the Government majority in the House. In the circumstances it is perhaps an excess of patriotism to say, as Lord St. Helier did in the *Encyclopædia Britannica,* that 'the (textual) controversy was nowhere carried on with greater acuteness or under more critical conditions than within the walls of the British Parliament.'[8]

## THE ACT OF 1857

The Act of 1857 deprived the old Ecclesiastical Courts in England of all the jurisdiction they previously exercised in respect of suits of nullity of marriage, or jactitation of marriage, for restitution of conjugal rights, suits for divorce *a mensa et thoro,* and all causes suits and matters matrimonial (except so far as related to the granting of marriage licences); and conferred all that jurisdiction on a new lay court for divorce and matrimonial causes, which was also to have power to pronounce decrees of dissolution *a vinculo.* In future, a decree of judicial separation was to be pronounced instead of the old decree of divorce *a mensa et thoro.* The new court was to hold its sittings in London or Middlesex *or elsewhere* as Her Majesty in Council should appoint. No local jurisdiction was given, except to Assize judges in cases of Judicial Separation and Restitution of Conjugal Rights, and this jurisdiction was taken away the following year, 1858. Under the Act, petitions for dissolution or for nullity of marriage were to be heard and determined by three or more judges, but soon this jurisdiction was allowed to be exercised by a single judge. A new force was given to desertion by one of the spouses. If continued for two years it became a ground for judicial separation and (coupled with adultery) it became a ground on which a wife might petition for dissolution. In such a case desertion was made a discretionary bar, though it was no bar to a suit for judicial separation. In cases of nullity and of dissolution of marriage the Act allowed an appeal to the House of Lords.[9]

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[8] 9th edition, *sub voce* Divorce.

[9] One may perhaps reserve an opinion as to the value of appeals to the House of Lords in marriage cases. Their Lordships had never been trained in the traditions of the Ecclesiastical Courts or of the Canon Law, and had lately decided in *The Queen* v. *Millis* ((1843–44, 10

The Act provided that in all proceedings other than those for dissolution the court was to proceed and give relief on the principles and rules of the old Ecclesiastical Courts. It also provided that a husband might petition the court praying for dissolution of his marriage on the ground that his wife had been guilty of adultery; and that a wife might petition for dissolution on the ground that her husband had been guilty of incestuous adultery, or of bigamy with adultery, or of rape or of sodomy or of bestiality, or of adultery coupled with such cruelty as, without adultery, would have entitled her to a divorce *a mensa et thoro*, or of adultery coupled with desertion without reasonable cause for two years or more. The court was to dismiss the petition if it found that during the marriage the petitioner had been accessory to or connived at the adultery of the other spouse or had condoned it or that the petition was presented or prosecuted in collusion with the respondent or respondents. If the court were otherwise satisfied on the evidence that the case of the petitioner had been proved, it was to pronounce a decree of dissolution:

> '*Provided always* that the court shall not be bound to pronounce such decree if it shall find that during the marriage the petitioner has been guilty of *adultery* or of unreasonable delay in presenting or prosecuting the petition or of *cruelty* towards the other spouse or of having *deserted* or *wilfully separated* from the other spouse before the adultery complained of and without reasonable excuse, or of such wilful neglect or misconduct as has *conduced* to the adultery.'[10]

Cl. 2 Fin. 532), followed in *Beamish* v. *Beamish* (1861) 9 H.L. Cases 274), that 'by the Ecclesiastical and the Common Law of England the presence of an ordained clergyman was from the remotest period essential to the formation of a valid marriage.' See the scathing remarks on this decision in Pollock and Maitland, *A History of English Law*, 2nd ed., Vol. 2, pp. 372–4. It is fair to add (as Mr. Justice Denning pointed out in a lecture at King's College, London, on January 31, 1947) that down to that date the law of marriage formed no part of the subjects taught in the Law Schools of the Inns of Court or of the Universities or other places of learning. And he added: 'Divorce is for many of our students the first subject with which they have to deal when they commence practice. They have to pick it up in the course of their work with the result that many go through their careers without really appreciating the fundamental principles of the standards of conduct which they should pursue in respect of it' (*The Divorce Laws*, p. 7).

[10] (Italics added.) The provision that the adultery of a petitioner shall operate as a discretionary bar to a decree of dissolution has been practically annulled in recent years.

After a decree of dissolution had become final it was lawful for the parties to marry again, provided that no clergyman in Holy Orders of the Established Church should be compelled to solemnise the marriage of any person whose former marriage had been dissolved on the ground of adultery; but in the case of such refusal the Minister was to permit any other Minister in Holy Orders of the Established Church entitled to officiate within the Diocese to perform the marriage service in his church or chapel.[11]

### SUBSEQUENT LEGISLATION

There is no need and no occasion to trace in detail the long series of amending statutes—Matrimonial Causes Acts—which followed in the wake of the Act of 1857.[12] By the Judicature Acts 1873–75 the jurisdiction of the Court for Divorce and Matrimonial Causes was transferred to and exercised by the Probate Divorce and Admiralty Division of the High Court of which the judges were apt to have a maritime approach in matters of matrimonial law. The Matrimonial Causes Act of 1884 provided that a respondent failing to comply with a decree for restitution of conjugal rights should be deemed guilty of desertion, and a suit for judicial separation might be forthwith instituted and sentence pronounced although the period of two years might not have elapsed since failure to comply with the decree for restitution. On proof of failure to comply with such a decree, and of adultery, the wife might forthwith present a petition for dissolution and be granted a decree.

The Matrimonial Causes Acts of 1878 and 1895 enlarged the jurisdiction of magistrates' courts in relation to married women

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'At one time, if a petitioner had himself been guilty of adultery, the court would rarely grant him a divorce, even if he proved that his wife had been guilty of adultery. Since the decision of the House of Lords in *Blunt* v. *Blunt* in 1943, the judges in such cases almost invariably exercise their discretion in his favour and grant a divorce. When both are guilty, the marriage has obviously broken down and there is no useful purpose in keeping it alive' (Sir Alfred Denning in the lecture referred to in n. 9 above).

[11] In passing one may note that the Act empowered a wife deserted by her husband to apply to a police magistrate or justices in petty sessions for an order protecting any money or property she might acquire by her own industry, and property she might become possessed of after desertion.

[12] Reference may be made to the magisterial work, edited by Professors R. H. Graveson and F. R. Crane, *A Century of Family Law, 1857–1957*, 1957.

by empowering the court, if her husband were convicted of aggravated assault against his wife, to make an order (having force and effect of a decree of judicial separation on the ground of cruelty) that the wife should no longer be bound to cohabit with her husband, and that the legal custody of any children of the marriage, under the age of 16 years, should be committed to the wife. In point of fact it came to be a matter of common form in courts of summary jurisdiction for the order made on a wife's application for maintenance to contain also a provision against cohabitation, whether the case was one in which such protection was needed or not. It was only after the Court of Appeal had pointed out in 1909 that the magistrates had a discretion whether or not to include a provision against cohabitation that a change began to be made by leaving out that provision in cases where all that was really needed was a provision against maintenance. Even as late as October 1930 the President of the Divorce Division had occasion to renew a protest: 'In the summons the applicant asks only for maintenance on the ground of wilful neglect on the part of her husband. The magistrates made Orders for separation and custody of children. It was the second or third case that came before him that morning with similar characteristics. They decreed a judicial separation and broke up the family without being asked for such an Order.'[13]

The readiness of the magistrates' courts to break up families in this way was one sign of the 'divorce-mindedness' which began to affect professional and public opinion at the turn of the twentieth century.[14] The forces and tendencies of political and social life no longer favoured an ideal of family life based on a life-long union of the spouses.

## SOCIAL IMPACT

The rise of Individualism on the one hand and of Socialism on the other hand operated as two counter forces which threatened alike the strength, coherence and continuity of the family. Walter Bagehot somewhere says that all the economists he read in his youth started with an image of society as two men cast on an otherwise uninhabited island. The individualist philosophy tended always to support the claim of individuals to liberty from the restraint of marriage when it became difficult or irksome. And classical socialism always felt that the family stood in the way of the solidarity of the State. Within the family itself, one might detect the same reluctance to accept the discipline of marriage and its natural consequences the production and rearing of children, as appeared (after 1877) in the marked decline of the birth rate in England and, for instance, in Australia. These influences tending to disintegrate the family and the home were accentuated by the increasing restlessness of modern life and the social effects of modern industry and of the concentration of people in great towns and cities. All these tendencies converged towards the break-up of family life and the life-long union of man and wife which was its basis. There was a real issue between the alternative of a narrow expediency which tried to make the lot of individual spouses easier and happier, and the wider expediency of strengthening family life against forces that constantly threatened its strength and stability.

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[13] See *The Times,* October 16, 1930.

[14] Perhaps the best instance of this state of mind appears in Halsbury's *Laws of England.* Look up the title *Marriage* in the relevant volume in any of the three editions of Halsbury, and one reads: '*Marriage:* See *Divorce.*'

The argument may be reinforced by reference to a Lloyd Robert's Lecture given by Professor Titmuss some ten years ago: 'In many respects,' he says, 'the social environment reflecting and informing the conscious and unconscious motives that underlie thought and behaviour has become increasingly inimical to the family. We may well ask why the fear of too many people is so much more powerful than the fear of the consequences of a population declining in numbers, ageing in composition and disinclined to replace itself. The population question certainly attracted more attention from economists and social scientists [during the early decades of the twentieth century] than at any time since the beginning of the nineteenth century. Nevertheless, the individual in contrast to the family continued to dominate the values and the morality of the period. The problem of mass unemployment was seen as a problem of the economically dispossessed individual and not as a contrast in the lives of families. And with the growth of autocracy in Europe all controversy centred round two governing poles of interest, the State and the individual. . . . The area of contradiction and conflict stretches over much of our social and economic policy not because we do not care about the family but because we do not think about the family.'[15] In fact, as Professor Dicey remarked, 'the Divorce Act of 1857 on the face of it did no more than increase the facilities for obtaining divorce. It in reality gave national sanction to the contractual view of marriage, and propagated a belief that the marriage contract, like every other agreement, ought to be capable of dissolution when it fails to attain its end.'[16]

### THE ROYAL COMMISSION, 1909–12

The steady increase in the number of petitions filed and of decrees of dissolution granted (there were 685 decrees in the year 1909) and the increasing pressure of internal and external tensions in the family life led in the year 1909 to the appointment of another Royal Commission of which the Chairman was Lord Gorell, lately President of the Probate, Divorce and Admiralty Division. Next to him in dignity and rank sat 'the most reverend father in God, our right trusty and right entirely beloved counsellor Cosmo Gordon, Archbishop of York, Primate of England and Metropolitan.' Included also in the Commission were our trusty and well-beloved the Honourable Lord Guthrie of the Court of Session and Sir William Anson and Sir Lewis Dibdin and (among others) our trusty and well-beloved Lady Frances Balfour and May Edith Tennant (wife of Harold John Tennant). The English Church still retained its place and the principle of votes for women was conceded. The Commission was to inquire into the present state of the law and its administration in divorce and matrimonial causes and applications for separation orders, especially with regard to the position of the poorer classes, and the subject of publication of reports of such causes and applications; and to report whether any amendment should be made. The Commission was expressly empowered to make an Interim Report with a view of enabling steps to be taken for the redress of any hardship the poorer classes might suffer under the administration of the existing law.

The majority of the Commissioners[17] recommended that the power of Courts of Summary Jurisdiction to make orders having the permanent effect of a decree of judicial separation should be abolished and (while retaining a limited jurisdiction in these courts, to make orders only where necessary for the immediate protection of one of the spouses or for the support of the wife and the children with her) that an application for permanent separation should be made to the High Court by simple process. The Commission also recommended that the High Court should hold sittings and exercise jurisdiction in local districts corresponding broadly with the existing circuits, and that for each district there should be a commissioner selected from among the county court judges or other persons appointed as Commissioners of Assize who, while in office, should have all the powers and jurisdiction of a judge of the High Court. Other amendments were recommended to be made in the Summary Jurisdiction (Married Women) Act, 1895, and the Licensing Act, 1902, relating to separation in cases of habitual drunkenness.

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[15] *The Lancet*, November 20, 1948, pp. 798–800.

[16] *Law and Opinion in England in the Nineteenth Century*, p. 43.

[17] *Report of the Royal Commission on Divorce and Matrimonial Causes*, Cd. 6478 (1912–13).

On points of substance the commissioners recommended that the two sexes should be placed on an equal footing as regards the grounds on which divorce might be obtained, and that decrees of dissolution might in future be granted on the grounds of (1) adultery, (2) desertion for three years and upwards, (3) cruelty, (4) incurable insanity, (5) habitual drunkenness found incurable after three years and (6) imprisonment under commuted death sentence.

In cases of nullity a decree should be pronounced:

(1) Where the other party was of unsound mind or in a state of incipient mental unsoundness (of which the petitioner was unaware), the suit to be instituted within one year after marriage and where no marital intercourse took place after discovery of the defect;

(2) In cases of epilepsy or recurrent insanity which was concealed and of which the petitioner was unaware at the time of the marriage, with a similar proviso;

(3) Where the other party at the time of the marriage was suffering from venereal disease in a communicable form and the fact was not disclosed, the first party being ignorant at the time of the marriage, with the like proviso;

(4) Where a woman is found to be pregnant by another man at the time of her marriage, such condition not having been disclosed to her husband, with a similar proviso.

Other recommendations related to the making of an order for presumption of death, and to the retention of adultery as a discretionary bar to a decree for dissolution, and to certain matters of increasing urgency in private international law.

It was also recommended that the judge hearing the case should be empowered to close the court if the interests of justice or of decency seemed to require it and, if the proposed fresh grounds of divorce were adopted (which had in fact no basis or warrant in Scripture), that the protecting clauses of the Act of 1857 with regard to the position of the clergy of the Church of England should be extended.

The Minority Report was signed by His Grace of York, Sir William Anson and Sir Lewis Dibdin, Dean of Arches. They examined the proposals of the majority from the point of view of the Christian faith and of family life and of the relations between Church and State in a Christian society, and were naturally unable to accept the main recommendations for new grounds of divorce, though they concurred in certain recommendations with regard to the law of nullity, and the presumption of death. They agreed that the law should be the same for wife and husband, and in the recommendations as to publication of reports of divorce and other matrimonial causes.[18]

### DECLINE OF CHRISTIAN CONCEPTION OF ENGLISH LAW

The Report of the Royal Commission was published in 1912. Within a little time, in the case of *Bowman* v. *The Secular Society, Ltd.*,[19] the House of Lords decided, in popular language, that Christianity is no longer part of the law of England. 'My Lords,' said Lord Sumner, 'I take the memorandum [of the respondent society] to be that of a society deliberately and entirely anti-Christian. If the respondents are an anti-Christian society, is the maxim that "Christianity is part of the law of England" true, and if so in what sense? . . . My Lords, with all respect for the great names of the lawyers who have used it, the phrase "Christianity is part of the law of England" is really not law: it is rhetoric . . . One asks what part of our law may

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[18] According to Dr. Fritz Schulz, to the pagan Romans, with their developed sense of dignity and decency, a modern divorce suit would have seemed shameless: *Principles of Roman Law*, p. 22. 'The reporting of divorce proceedings in the English-language Press shocks and disgusts many Nordic readers,' writes a Danish reader of *The Times*, January 23, 1957.

[19] [1917] A.C. 406 at 464.

Christianity be, and what part of Christianity may it be that is part of our law? Chief Justice Best once said [in 1828] that "there is no act which Christianity forbids that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England." But this was rhetoric too.'[20]

Of the maxim in dispute in *Bowman's* case Professor Holdsworth has this remark: 'It is true that there is still an Established Church; that the King is still its Supreme Governor and the Defender of its Faith; that its law is still the King's Ecclesiastical Law and an integral part of the law of England. But, like many other parts of the law and constitution of England, these are survivals of an older order from which all real meaning has departed, with the abandonment of that medieval theory of the relationship of Church to State, to which they owed their origin.'[1]

### THE MATRIMONIAL CAUSES ACTS, 1923, 1937

Even in the new climate of opinion successive governments hesitated a long while before translating into statutory form the recommendations of the Royal Commission of 1912. In fact, it was by Private Members' Bills that the Matrimonial Causes Act, 1923, and the Matrimonial Causes Act, 1937, were introduced into Parliament, the government of the day taking no responsibility for either of these measures, which, to the late Noel Middleton, Q.C., the learned editor of *Rayden on Divorce*, was a thing 'at once remarkable and reprehensible.'

The Act of 1923 put women on the same level as men in suits for dissolution, and the Herbert Act of 1937 gave statutory effect to other outstanding recommendations of the Commission of 1912, introducing facilities for divorce *a vinculo* in cases which have proved most difficult of definition, *e.g.*, desertion and cruelty, and incurable unsoundness of mind, and creating new grounds of nullity of which the first and most debatable was that the marriage 'had not been consummated owing to the wilful refusal of the respondent.' The Act also provided for the making of a decree of presumption of death after seven years' absence, and the dissolution of the marriage.

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[20] None the less in the course of his judgment Lord Sumner found it possible to say: 'Ours is and always has been a Christian State. The English family is built on Christian ideas; and if the national religion is not Christian there is none' (*ibid.*).

[1] *A History of English Law,* Vol. VIII, p. 403.

In the evolution of the modern law it will appear to some that in the course of the last century the courts have forgotten or radically altered the meaning of Christian marriage. From a very early time Christian marriage has meant, and has been universally understood to mean, marriage between baptised persons. This meaning was known to the Canonists of Doctors' Commons and to the Royal Commissioners of 1850 and 1910[2] and, at a later time, to some at least of the Lords of Appeal in Ordinary and of the Judicial Committee of the Privy Council.[3] In the tradition of the canon law every valid marriage between baptised persons (*matrimonium ratum*) is of its nature a sacrament. A marriage validly celebrated between unbaptised persons is lawful (*legitimum*) without being a sacrament. The canon law of the Universal Church applies in principle to the marriage of all baptised persons, though non-Catholic Christians are under no obligation to follow the Catholic form of celebration of marriage.[4]

### A NEW CONCEPT OF MARRIAGE

In certain decisions of the courts in recent times one may trace the process of elimination of the Christian concept of marriage. Thus in *Weatherley* v. *Weatherley*, where the court had to say whether the refusal of all intercourse amounted to desertion within the meaning of the Matrimonial Causes Act, 1937, Viscount Jowitt, L.C., rejected as irrelevant the doctrine of marriage set forth in the Book of Common Prayer that one of the principal causes for which marriage was ordained was the procreation of children: 'We must remember that marriage whether solemnised in a church or a register office, whether contracted between Christians or between those who have different or no religious beliefs, must in each case have the same legal consequences: and remembering these things we shall I think find the solution of the question which arises for determination in this case, and in similar cases, not upon a consideration of the Christian doctrine of marriage, as laid down in the Book of Common Prayer, but on the true construction of the relevant Acts of Parliament.[5]

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[2] See, *e.g.*, the letter from His Holiness the Pope to the King of Sardinia (1852) which is printed as an Appendix to the first *Report* of the Royal Commission of 1853; and see *Report of the Royal Commission* (1912), at pp. 30–1, and *Minutes of Evidence*, Vol. II, QQ. 22925, 22940 *et seq.*; and elsewhere. Neither Sir William Anson nor Sir Lewis Dibdin nor Lord Guthrie was ignorant of these things.

[3] *e.g.*, Lord Phillimore and Lord Dunedin (see the judgments in *Salvesen's Case* [1927] A.C. 641) and Lord Russell of Killowen, and the successors (Catholic and non-Catholic) of Lord Guthrie in the Court of Session. And see *Lindo* v. *Belisario* (1795) 1 Hagg. Const. 216, Appendix, p. 11.

[4] *Codex Juris Canonici* (1918) Canons 1012. 1013, 1015, 1016, 1099.

In line with the decision in *Weatherley* v. *Weatherley* is the decision in *Apt* v. *Apt*[6] where the President of the Divorce Division spent some sixteen pages of the report in an endeavour to decide whether marriage by proxy in the Argentine was repugnant or abhorrent to Christian ideas of marriage. In his statement of the relevant facts it immediately appeared that both parties to the impugned ceremony of marriage were German nationals of Jewish origin. Their marriage—by proxy—was held in the contemplation of English law to be valid Christian marriage. In the well-known case of *Baxter* v. *Baxter* the House of Lords had next to determine an issue as to the meaning of the word 'consummate' in section 7 of the Act of 1937 which speaks of 'wilful refusal to consummate the marriage.' Having declared in one sentence that 'it is indisputable that the institution of marriage generally is not necessary to the procreation of children' the judgment[7] proceeded (with the concurrence of all their Lordships) 'nor does it [*i.e.*, the procreation of children] appear to be a principal end of marriage as understood in Christendom which, as Lord Penzance said in *Hyde* v. *Hyde*[8] may for this purpose be defined as the "voluntary union for life of one man and one woman to the exclusion of all others."' After a reference to the case of *Weatherley v. Weatherley* and again a denial that procreation of children is the principal end of marriage, the Lord Chancellor concluded: 'Long before the passing of the Matrimonial Causes Act, 1937, it was a matter of common knowledge that reputable clinics had come into existence for the purpose of advising spouses on what is popularly called birth control; and it is also a matter of common knowledge that many young married couples agree to take contraceptive precautions in the early days of married life. I take the view that in this legislation Parliament used the word "consummate" as that word was understood in common parlance and in the light of social conditions known to exist.'[9] In the judgment of their Lordships the consummation of marriage thus seems to belong to the order of physics rather than to the order of biology.[10]

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[5] [1947] A.C. 628 at 633.

[6] [1947] P. 127.

[7] [1948] A.C. 274 at 286.

[8] (1866) L.R. 1 P.D. 130 at 133.

## EPILOGUE

At the end of the story a critic might say that the achievement of the legislature and the lawyers of England in the last century has been first to obscure and then to obliterate the traditional meaning of Christian marriage, and secondly to impair—perhaps to destroy—the traditional sanctity and even the essential character of natural marriage. But such an inference would perhaps be unfair. In common with others, English lawyers and judges have learned in the course of years the importance of mother and of father in the spiritual as well as in the material life of a child, and the essential value of an upbringing in a common home under the love and protection of both parents. The head masters and head mistresses also, of colleges and schools for boys and girls up and down the land, are made aware every day of the tragic situation of the child or of children of broken homes. In a recent issue of *The Listener* Professor John Macmurray said that 'the primary religious institution is the family in which we learn to be persons in relation, and which is itself a unity in the bond of affection and the original of all human society.'[11] Of this truth all honest citizens were reminded a decade ago by the Report[12] of the Curtis Committee on Deprived Children which at once transformed the local and central administration of institutions for children throughout the land. As long ago too as 1947 the Registrar General requested superintendent registrars in England and Wales immediately before celebrating a marriage to speak certain words to the future spouses reminding them of the solemn and binding character of the vows they were about to make on entering into the life-long union of marriage.[13]

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[9] [1948] A.C. 274 at 290.

[10] Though the judgment of their Lordships is final if not infallible, one may note that four distinguished Queen's Counsel, including the late Noel Middleton, a past master in the law of matrimonial causes, have publicly declined to accept the doctrine in *Baxter's* case that the procreation of children is not a principal end of marriage as understood in Christendom: it is, they say, in direct conflict with the Book of Common Prayer, and went beyond what was necessary for the decision of the court. It was an *obiter dictum* which contradicts a wealth of previous judicial authority which the House of Lords did not review. Moreover the 'purpose' of Lord Penzance in *Hyde* v. *Hyde* had nothing to do with procreation of children, but only with the effect to be given to polygamous (Mormon) marriages (*The Church and Nullity of Marriage* (S.P.C.K., 1955), pp. 33–4. For *matrimonium consummatum* in the Canon Law of the Universal Church, see Canons 1013, 1015). For the conception of marriage as understood in Christendom is it necessary to look beyond Paul and Augustine, or the men to whom our own Lyndwood pointed, Innocent III and Johannes Andreae? The name of Lord Penzance is not included in the *Dictionary of National Biography*. His experience at the Bar was as junior counsel to Excise and Customs and to the Duchy of Lancaster (1840–60) and Baron of the Exchequer (1860–63). In 1863 he became judge of the Probate Court without, it seems, any training in the traditions of the Canon Law or of Doctors Commons.

[11] December 20, 1956, p. 1027.

In 1951 the new Royal Commission on Marriage and Divorce was bidden in its terms of reference 'to inquire into the law concerning divorce and other matrimonial causes . . . having in mind the need to promote and maintain healthy and happy married life and to safeguard the interests and wellbeing of children.'[14] The Commission unanimously recommended that in future, before making a final decree of divorce, the courts should be satisfied that the arrangements proposed for the care and upbringing of any children of the marriage are the best which can be devised in the circumstances; and that until the court is satisfied, a *decree nisi* shall not be made absolute.[15]

'In view of the existing tendency to take the duties and responsibilities of marriage less seriously than formerly,' the Commission expressed the hope[16] that a really marked extension in the work of education, pre-marital instruction, marriage guidance and conciliation, would check the tendency to resort too readily and too lightly to divorce. Unless this tendency was checked there was a real danger that the conception of marriage as a life-long union of one man with one woman might be abandoned, which would be an irreparable loss to the community. 'If the tendency to resort too readily to divorce continued unchecked,' the first chapter of the Report concluded, 'some of us think it may become necessary to consider whether the community as a whole would not be happier and more stable if it abolished divorce altogether, and accepted the inevitable individual hardships this would entail.'[17]

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[12] Cmd. 6922 (1946).

[13] Letter of February 16, 1950, printed in *The Church and Nullity of Marriage* (S.P.C.K., 1955), p. 60.

[14] *Report of Royal Commission on Marriage and Divorce,* Cmd. 9678 (1956), p. 1. No representatives of the Christian Churches as such were included in the Commission who were 'all agreed that it is right that in certain circumstances divorce should be allowed,' though evidence was of course heard from representatives of the Churches and other religious bodies.

[15] Para. 53 of *Report,* pp. 10–11.

[16] Para. 47, *ibid.,* p. 9. See also paras. 341–4, pp. 97, 313.

It is perhaps significant that after an experience of a hundred years, and a Royal Commission of which the hearings and deliberations lasted for five years, so deep a doubt should have arisen in minds which in the beginning were all agreed in favour of divorce.[18]

In spite of the good intentions of so many excellent and honest advocates of reform, is it possible, at the end of a long experience and in the light of a changed philosophy, to entertain these doubts? Is it possible (apart from Christian teaching) to hold that the institution of divorce is intrinsically opposed to the material and spiritual welfare of the family—father, mother and child—and therefore of the community? Can it be that its introduction a century ago was a mistake?

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[17] Para. 54, *ibid.*, p. 11.

[18] It is perhaps less surprising if one observes that throughout the years these doubts have haunted a whole series of persons who have had to do with the administration of the law; Lord Campbell, for instance, who presided over the Royal Commission of 1853, wrote in his Diary in 1859: 'Like Frankenstein, I am afraid of the monster I have called into existence' (*Autobiography*, Vol. II, pp. 361–2); and Lord Mersey, President of the Divorce Division, who gave evidence in 1910, said: 'The advantages of divorce to the rich are so questionable that I do not care to extend it too much to the poor'; and Mr. Justice Bargrave Deane deposed, after thirty years of experience at the Bar and on the Bench, 'I think it is a misfortune that the Divorce Laws were ever passed' (cited in Merrivale, *Marriage and Divorce*, p. 44); and Lord Merrivale, who on his retirement from the office of President wrote his little book on *Marriage and Divorce*, which ended with the sentence: 'Let us bear in mind that marriage is an outstanding means of benefit; and that divorce is its enemy' (p. 71). In a letter to the Editor of *The Times*, January 28, 1957, Professor Graveson called attention to a passage in the excellent work he edited with Professor Crane, *A Century of Family Law*, 1957: Easy divorce 'carries in its train disintegration of the family as a unit of society and so ultimately of society itself.'

## 3

# THE RIGHT TO WORK[*]

### Dennis Lloyd

It is with an inevitable sense of deficiency that I stand here before you on this occasion as the holder of the Chair of Jurisprudence in this College, of which as we all know, the first occupant in 1826 was John Austin, and the latest before myself was my distinguished and very learned predecessor, Dr. Glanville Williams.[1] Of those who came in between I desire now only to refer to Sheldon Amos who was appointed in 1869—and to mention him, not on account of his undoubted eminence as a lawyer, but because it was he who once delivered himself of the comforting reflection that the interest of lecturing is heightened as the number of a class diminishes and culminates when the audience is reduced to one.[2]

As for John Austin, despite, or perhaps because of, the dominant influence of his thought, it became the fashion for a time to depreciate his contribution. We may recall, for instance, Sir Frederick Pollock's reference to the 'damnable heresies'[3] of Austin, and the late Professor Buckland has told us that whereas in the days of his youth Austin was a religion 'today he seems to be regarded rather as a disease.'[4] Equally characteristic is the suggestion in regard to Austin's command theory of law,

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[*] This Lecture in the series of *Current Legal Problems* was also Professor Lloyd's Inaugural Lecture as Quain Professor of Jurisprudence in the University of London.

[1] The Chair of Jurisprudence was first established as the *Quain* Chair in 1950 and Dr. Glanville Williams was the first Quain Professor of Jurisprudence. There had, however, been thirteen previous Professors of Jurisprudence at University College starting with John Austin. The present Quain Chair absorbed the former Quain Chair in Comparative Law founded under the will of Sir John (Mr. Justice) Quain, a former student of the College. Among former holders of the Chair of Jurisprudence were Sheldon Amos, W. A. Hunter, Sir Frederick Pollock, Bt., and A. F. Murison, K.C.; and of the Quain Chair of Comparative Law, the Rt. Hon. Augustine Birrell, K.C., and Sir Maurice Sheldon Amos, K.C.

[2] See H. Hale Bellott, *University College, London, 1826–1926*, p. 330.

[3] *Pollock-Holmes Letters*, I, p. 71.

[4] *Reflections on Jurisprudence*, p. 2.

/ c. [illegible] of the [illegible]

that he learnt his jurisprudence in the Army.[5] Yet there are signs, welcome signs, of the inevitable reaction. We should especially not lose sight of the fact that Austin would have entirely sympathised with the emphasis placed on law reform in modern jurisprudence. After all was he not a devoted Benthamite and thus linked with the most progressive movement of his age? Austin, indeed, like all sound jurists, possessed not only great analytical skill but also the spirit of a reformer. It therefore seemed appropriate in the atmosphere of this College, illuminated as we still are by the mortal remains of Jeremy Bentham, to choose a subject which would illustrate how, in one small but vital corner of the law, the torch of legal reform handed on to us by Bentham and his disciples still shines, though perhaps with a more flickering light than when it was grasped in the firm hand of the master. Bentham, you will remember, was the first to stigmatise the idea that the judges did not *create* law, as a childish fiction, though he preferred to regard judge-made law not as the product of judge alone but as the joint product of 'Judge & Co.'[6] In that sense, it is of a sample of the work of 'Judge & Co.' that I am to speak on this occasion.

'Parables,' the Archbishop in *St. Joan* observes, 'are not lies because they describe what never happened.'[7] We lawyers, however,—unlike theologians—do not need to have recourse to fictitious moral instances, for we have ready-made an endless source of cautionary tales, culled from the pages of real life, in the proceedings of our courts of law. It is with one such tale that I would venture to begin this lecture.

### A CASE OF WRONGFUL EXPULSION

Early in 1955 a certain Mr. Harkness, who had been an electrician all his life and who was a member of the Electrical Trades Union, was employed at an iron and steel works in Cumberland. An agreement at national level had been made between his union and the employers as regards working extra time on national holidays such as Bank holidays. Under this agreement the employers were entitled to call on men to work over such holidays for extra money. The local branch of Mr. Harkness's union did not think much of this agreement and resolved to take off all Bank holidays whether paid or not. Mr. Harkness and a few others strongly opposed this resolution and on the following Easter when the employers at his works called for attendance for holiday work he turned out and did his stint. As a result he was charged under the union rules with conduct bringing discredit upon the union and his fellow-members, and was fined £10. This he refused to pay and thereupon he was excluded from the union. Mr. Harkness continued at his work but his fellow-workers threatened the employers with a strike if they continued to employ 'non-union' labour. The management refused to dismiss Mr. Harkness, who had after all been guilty of no more than compliance with their own orders and also with the union's agreement at national level, but as it was clear that no one would work alongside him, they eventually suspended him with pay. Mr. Harkness decided that discretion was the better part of valour. He therefore went back to the union, agreed to pay the £10, and applied for readmission. Under the rules a member who had ceased to be a member could re-apply on payment of twice the usual subscription, which was two and sixpence, plus such further charge as the branch thought fit. Mr. Harkness was told that he could not be readmitted unless he paid a further £50. As a result he brought proceedings in the High Court claiming that his exclusion was void and seeking an injunction and damages. The case was tried on June 26 to 29, 1956, before Streatfield, J.[8]

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[5] Referred to by C. A. W. Manning in *Modern Theories of Law*, p. 182.

[6] See Austin, *Lectures of Jurisprudence* (ed. Campbell), II, p. 645. Austin referred to this as the 'somewhat disrespectful language of Mr. Bentham'; cf. *infra*, n. 15, p. 56.

[7] Scene II.

Some of the facts which emerged at the trial were not without interest. In evidence Mr. Harkness explained why he eventually decided to offer to pay the fine: 'Even though I knew I was morally right I began to fear the consequences of being unable to earn a living. It is not just a job with me; it is my whole study. I have a wife and family to keep and if £10 was going to settle the whole rotten affair I was prepared to do it even though it was against my moral convictions.' His Lordship asked him where his loyalty pulled him strongest, to the union as a whole or to the branch, to which he answered, 'My loyalty pulls to the agreement.' *His Lordship*: 'It is like the headmaster of a school saying that boys shall wear top hats on Sundays. The housemaster says he does not like top hats, takes a vote, and says they shall wear caps. Because a bòy does what the headmaster tells him the housemaster canes him.'

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[8] *Harkness* v. *Electrical Trades Union*; for references, see the relevant issues of *The Times* newspaper.

When the branch secretary was asked whether the £50 was intended as a punishment he replied: 'The question of punishment did not enter our minds because we had a strong suspicion that the fee, whatever the size, would be paid by the management.' *His Lordship*: 'I wonder you were so moderate. You might have made it £700 or £800. You had a shrewd suspicion he had a rich uncle behind him.' Cross-examined, the secretary was asked whether he was proud of his performance over this matter. The *witness*: 'Not particularly.' *Counsel*: 'Do you think it is a credit to the branch?' The *witness*: 'I think it is.' *His Lordship*: 'You think it is to the credit of the branch that in these circumstances this man should be hounded out of the union?' The *witness*: 'That is my view.'

Another point which emerged was that the executive council of the union had, not unnaturally, ordered the branch members to go back to work; the members eventually complied though not without a letter of protest from the branch secretary which stated: 'We are returning to work disillusioned, disappointed, and disgusted.' As Counsel for Mr. Harkness pointed out at the hearing: 'These men who were so desperate for Mr. Harkness's dismissal and had such bitter memories were those who were going to adjudicate on his readmission and fix his entry fee.'

On the fourth day of the hearing a settlement of the action was announced, the defendants submitting to judgment for a declaration that the plaintiff was wrongly excluded and for damages of £596. The learned judge expressed satisfaction that the plaintiff was being reinstated after he had in fact been deprived of his right to earn his living. One cannot help wondering whether this satisfactory conclusion could have been attained at all in the absence of the Legal Aid Scheme.

## DOMESTIC TRIBUNALS AND THE 'CLUB CASES'

I have dwelt at some length upon this interesting piece of litigation, not because I think it in any way establishes that trade unions invariably or even usually adopt a despotic and high-handed attitude to their members, but because I think it does, very plainly, illustrate the real dangers which would result from vesting power over a man's livelihood in so-called domestic tribunals without the right of any appeal to the impartial judgment of a court of law. We may recall Maitland's remark in relation to an earlier epoch, that '*libertas* in legal language meant freedom to oppress others.'[9] Indeed any intelligent layman would be astonished to learn that in disputes such as this, where a man's livelihood is at stake, there could be any doubt whatsoever as to the jurisdiction of our courts of law to ensure that justice has been done. Yet, until very recently, our judges were still tending to approach this type of problem as though it was comparable to that of a gentleman being expelled from his club by a resolution of the committee and therefore one which should be approached on tip-toes, without encroaching on the inalienable right of Englishmen to decide whom they desire to consort with in the club-room. Happily there are signs in recent years of a more genuine understanding of the nature of these problems and a much greater readiness to tackle them in a more courageous spirit. This is not to say that the position can be said, even yet, to be all that can be desired, as I hope to indicate in the course of this lecture. Nevertheless the law on this topic is still in a fluid state and, if I may employ a chemical metaphor, there is reason to hope that the particles are still in a free enough state to produce fresh and vigorous, if not explosive, combinations.

In considering the present state of the law I think it is important firstly to appreciate what is comprised in the expression 'a domestic tribunal.' This term (apart from being a form of abuse) can be and is applied to a great diversity of bodies which cannot be classified with precision. I exclude from present consideration statutory tribunals and also trade associations whose activities are now affected by the Restrictive Trade Practices Act, 1956.[10] This still leaves in addition to trade unions those professional or semi-professional bodies which possess a *de facto* power over all those connected with some field of activity, of which the most conspicuous instances are sports such as football, horse-racing and boxing.[11] Such bodies, which doubtless perform a valuable function in controlling activities of this sort and thus protecting the public against dishonesty or exploitation, are nevertheless generally of a peculiar kind. They are usually self-appointed and amount to a kind of apostolic succession with unfettered control over their own rules and constitution. Unlike trade unions, their jurisdiction is exercised not over their own membership but over all persons who come under their sway by being concerned in the particular activity involved. The power, though *de facto* rather than *de jure,* is none the less real, for short of cutting oneself off altogether from, for instance, the sport of horse-racing, one has no choice whatsoever but to submit to the control of the Stewards of the Jockey Club.

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[9] Cited, G. G. Coulton, *Mediaeval Panorama,* p. 56.

[10] See Part II, ss. 24–7.

[11] For the qualified privilege extended to such bodies in regard to defamation, see Defamation Act, 1952, s. 7.

A word must also be said about purely social bodies. The power of the committee of a club to expel a member for conduct of which it disapproves is essentially a very different matter from the power of the bodies to which I have previously referred to take away a man's livelihood. I would include in this category of social bodies not merely clubs in the ordinary sense but all associations formed for the pursuit of some mutual interest but without power over any one's means of livelihood. Although the early club cases have had an unfortunate influence on the development of this branch of the law, as we shall see, it is now increasingly recognised that cases of this sort are in a very different category from those where a man's livelihood is at stake. When, for instance, as Mr. St. John Ervine tells us, the County Wexford Beekeepers' Association proposed, in 1932, to expel Mr. Bernard Shaw from their society for blasphemous statements in his *Adventures of a Black Girl in her Search for God*—a resolution which to the Association's eternal credit was ultimately rejected —there was a threat not to any curtailment of Mr. Shaw's ample livelihood, but only to his future enjoyment of the society and mutual aid of Wexford beekeepers.[12] I shall not, therefore, pause to inquire how far the limited responsibility that our courts have hitherto assumed for the control of such bodies has been affected by the recent developments to which I shall refer.[13]

### JURISDICTION OF THE COURTS—PROPERTY

In the days when the typical association was thought of as being a social club the doctrine was propounded that a court could not accept jurisdiction to intervene in the case of a wrongful expulsion of a member save where some right of *property* in the member had been infringed. This approach was doubtless encouraged by the strong feeling that clubs were purely voluntary associations and that a court should be very slow to intervene in their private affairs unless an injury to property could be shown. 'None but the members of the club,' observed Lord Romilly, M.R., in 1868,[14] 'can know the little details which are essential to the social well-being of such a society of gentlemen, and it must be a very strong case that would induce the court to interfere.' It is somewhat curious that this attitude in the club cases was readily transferred in the late Victorian period to a quite different type of body, the recently legalised trade unions, and it was indeed in a leading trade union case in 1880[15] that Sir George Jessel, M.R., clearly based the jurisdiction on the right of property in the member, of which he is unjustly deprived by wrongful expulsion. Whatever might be said for this basis in the case of a mere social club it is highly artificial when applied to membership of a trade union[16] and is, indeed, totally inapplicable to cases where a person is prevented from earning his livelihood by the withdrawal of a licence granted to him by a body of which he is not a member, as in the case of a trainer licensed by the Jockey Club or the Boxing Board of Control. Nevertheless, this doctrine lingered on for many years, though not without qualifications,[17] and it is only since 1949 that the courts have come clearly to acknowledge its inadequacy in regard, at any rate, to such bodies as have assumed a *de facto* power over the right of individuals to earn a livelihood within a particular field of human activity.[18]

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[12] St. John Ervine, *Bernard Shaw,* p. 525.

[13] As to this, consider the observations of Denning, L.J., in *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329 at 342.

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[14] *Hopkinson* v. *Marquis of Exeter* (1868) L.R. 5 Eq. 63 at 68.

[15] *Rigby* v. *Connol* (1880) 14 Ch.D. 482.

[16] *Cf. per* Denning, L.J., in *Bonsor* v. *Musicians' Union* [1954] Ch. 479 at 485.

[17] For a full examination of the earlier authorities, see my article 'The Disciplinary Powers of Professional Bodies' (1950) 13 *M.L.R.*, pp. 281 *et seq.*

[18] It is perhaps worth noting that Art. 23 (1) of the 'Universal Declaration of Human Rights' seeks to guarantee the right to work; cf. H. Lauterpacht, *An International Bill of the Rights of Man* (1945), pp. 155–62.

## CONTRACT

The earliest of the recent cases where this issue was raised, though not decided, seems to have been *Russell* v. *Duke of Norfolk*[19] in 1949. There the plaintiff was a trainer of racehorses to whom a licence had been granted by the Jockey Club. A licensed trainer, it need hardly be said, is not a member of the Jockey Club and obviously has no proprietary interest which would be infringed by a wrongful withdrawal of his licence. Asquith, L.J., however, was apparently prepared to hold that where the proposed withdrawal was for misconduct, jurisdiction could be based on the contractual nexus between the parties. Denning, L.J., while not rejecting contract as a basis, preferred to emphasise that where a person was being arraigned for misconduct, exposing him to the penalty of disqualification, very different considerations applied from those applicable where a licence was merely withdrawn as a matter of discretion and without penalty. 'The Jockey Club has a monopoly in an important field of human activity. It has great powers with corresponding liabilities.'[20] Hence in such a case the court would be entitled to intervene if a person was penalised in disregard of the principles of natural justice. On this view it will be seen regard is had not to the formal categories of property or contract as a basis of the court's intervention, but rather to the nature of the powers exercised by the domestic tribunal.

*Russell's* case revealed the insufficiency of property as a basis for intervention. In the very unsatisfactory case of *Abbott* v. *Sullivan*[1] in 1952, the Court of Appeal apparently accepted[2] contract as a basis of jurisdiction while at the same time revealing its inadequacy in the circumstances of that case. The facts are sufficiently curious to deserve repetition here. In the London Docks there is a privileged body of persons known as corn-porters who have, by a historical process which need not detain us, secured a total monopoly in regard to what is recognised to be under present day conditions the highly remunerative activity of corn-portering in the Port of London. A mysterious committee whose origin is lost in the mists of history exercises *de facto* jurisdiction over all such porters and no one can act as a corn-porter unless accepted by this Committee. This body has no written constitution or rules of any kind but in fact exercises control by the infliction of fines and by its power to remove a corn-porter from a register kept by the Committee. Complaints were made against Abbott, a corn-porter, and he was summoned to attend a meeting of the Committee. This meeting was convened by one Platt who was an officer of the trade union with which the Committee was connected. Platt attended the meeting in an advisory capacity and Abbott was duly fined. Immediately afterwards Abbott followed Platt into the street, and a row took place which ended in Abbott assaulting Platt. Platt then convened an emergency meeting of the Committee. Abbott wrote apologising for his conduct but refused to attend and protested against the Committee dealing with a matter unconnected with his duties as a corn-porter. Thereupon the Committee resolved that Abbott be removed from the register. Abbott paid the fine and applied for reinstatement. This was refused and proceedings followed. The trial judge granted Abbott a declaration that the resolution of the Committee removing him from the register was *ultra vires* but held that there was no 'peg' on which he could hang an award of damages, although the plaintiff had admittedly been wrongfully kept out of this lucrative form of employment for several years. The Court of Appeal upheld this decision by a majority.

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[19] [1949] 1 All E.R. 109.

[20] At. p. 119.

[1] [1952] 1 K.B. 189. For a detailed examination of this case and of *Lee* v. *Showmen's Guild* (referred to *infra*), see my article 'Judicial Review of Expulsion by a Domestic Tribunal' (1952), 15 *M.L.R.*, pp. 413 *et seq.*

[2] There is a certain ambiguity in the judgments, which refer on the one hand to the need for the *tribunal* itself to found its jurisdiction on a contract express or implied, and on the other hand to the fact that the power of the *court* to intervene is based on the existence of a contract: see [1952] 1 K.B. 189 at 194, 197, 201, 216. *Cf. Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329 at 341, 347. In the latter case Denning, L.J., suggested that the basis of the jurisdiction was that no tribunal could 'sit in judgment' on others without the sanction of Parliament or an agreement of the parties (p. 347). *Sed quaere,* whether this does not go too far, *e.g.,* suppose a trainer refuses to submit to the Stewards of the Jockey Club?

### TORT REJECTED

The case is unsatisfactory not only in its result by failing to afford a remedy for a genuine grievance, but also because with all respect—and I say this after having read the case many times—it is almost impossible to say what the case really decided, if anything. Much difficulty was caused by the fact that the plaintiff's advisers were evidently very doubtful as to how to plead their case. I understand that they finished up by pleading—in a much amended statement of claim—everything except contract, which was the one basis upon which the court was ultimately prepared to acknowledge jurisdiction. Thus an attempt was made to found the claim to damages on tort. This unfortunately—for reasons which will be apparent later—failed and it may be regretted that the court disposed of the issue rather casually in its judgments. Morris, L.J. (with whose judgment the Master of the Rolls agreed), contented himself with stating that even if the categories of tort were not closed there seemed no basis for framing a claim for mere wrongful expulsion in tort, at any rate in the absence of malice or conspiracy. Denning, L.J., referred to Bowen, L.J.'s well-known dictum that it is an actionable wrong intentionally to injure another without just cause or excuse, but thought that such a broad proposition had not yet been accepted into our law. However, contrary to the view of his brethren, he thought the claim for damages in the particular case could be adequately derived from contract.

## DECLARATION AND INJUNCTION IN ABSENCE OF CONTRACT

The recognition of contract as a basis of the court's jurisdiction is a very welcome advance and will enable the court to deal with most cases where a member has been wrongfully expelled from a union or professional body having a written constitution or set of rules which can be treated as the contract between the parties. But the cases of *Abbott* v. *Sullivan* and also, to a lesser extent, *Russell* v. *Duke of Norfolk,* show the difficulties there may be in spelling out a contract in particular circumstances. Moreover, there may be cases where a domestic tribunal exerts a decisive jurisdiction to deprive persons of their livelihood, who are not merely non-members of the parent body but have never entered into any sort of contract with it. This type of situation was recently considered in the case of *Davis* v. *Carew-Pole.*[3] Davis was a trainer of hunters for point-to-point meetings. These are governed by the National Hunt Committee which is a self-appointed body performing a function in regard to steeplechasing comparable to that of the Jockey Club in relation to flat-racing. Under the National Hunt rules a trainer for National Hunt

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[3] [1956] 1 W.L.R. 833.

Meetings has to be licensed by the Stewards of the Committee. On the other hand a licensed trainer is not allowed to train for point-to-point meetings. It follows that under the rules only an unlicensed person can carry on the occupation of training for point-to-point meetings. Nevertheless any such trainer is bound to observe the relevant National Hunt rules under pain of severe penalties, including fines and disqualification. Suppose then that such an unlicensed trainer is wrongfully disqualified by the Stewards. Has he any remedy in law? Unlike a licensed trainer, as in the *Russell* case, he cannot point to any licence as containing the contract between the parties. On what basis then can he invoke the jurisdiction of the court? In *Davis's* case it was argued that he might do so in two ways. Firstly, it was contended that where a man's livelihood was at stake and a domestic tribunal was purporting to act on an allegation of misconduct, this was a quasi-judicial function which the court had an inherent jurisdiction to supervise to see that justice was done. Secondly, it was contended that in any event the plaintiff, by attending an inquiry on the invitation of the Stewards, had submitted to their jurisdiction and thereby an implied contract was constituted between the parties. It was held by Pilcher, J. (following *Abbott* v. *Sullivan*) that the court had power to grant a declaration and injunction (as opposed to damages) even in the absence of contract,[4] but that if a contract was necessary he would be disposed to hold that an implied contract was created by the submission to the jurisdiction.

### INADEQUACY OF CONTRACT

The courts have thus, in recent years, shown some flexibility in extending legal remedies to protect a man in his right to work. But though the courts have moved towards a broader equitable basis in granting the remedy of a declaration and injunction to protect the right to earn a livelihood, the question of damages remains a more delicate one. Some advance has been made in recognising that this can be founded on breach of contract—a point which has received added force by the recent decision of the House of Lords in *Bonsor's* case[5] allowing a member to obtain damages from his union for wrongful expulsion in breach of the union's rules; but there must still be many cases where serious damage is inflicted on a person who yet will be unable to point to any contract or to establish an implied term regarding expulsion to the satisfaction of a court. Or again, suppose that the plaintiff in *Davis's* case had refused to submit to the jurisdiction of the Stewards and they had wrongfully disqualified him *in absentia*. Here the court might have granted a declaration and injunction but there would clearly be no basis for awarding damages for breach of contract. It is therefore difficult to avoid regretting that the court in *Abbott* v. *Sullivan* did not give fuller consideration to the question of liability in tort, especially when one bears in mind that this form of liability has been accepted in a recent decision in Canada,[6] *Abbott* v. *Sullivan* not being followed on this point.[7] Of course, so far as *trade unions* are concerned, by statute[8] no action in tort can in any event be brought against the union itself, though in view of *Bonsor* this is not now of much importance. The statute does not, however, prevent an action in tort being launched against the individual officials concerned.[9]

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[4] To what extent the court will grant the remedies of a declaration and injunction in the absence of a cause of action based on contract or on an actual or potential tort, is far from clear. It is submitted, however, that there is nothing contrary to principle in the court so doing, since the creation of rights in English law has always tended to result from the availability of remedies, rather than the other way round (*cf.* Sir R. Evershed, 'The Influence of Remedies on Rights' (1953) 6 *Current Legal Problems*, pp. 1 *et seq.* See also *Bonsor* v. *Musicians' Union* [1954] Ch. 479 at 498, 523; and *Thompson* v. *British Medical Association* [1924] A.C. 764 at 775. And see the discussion in Street, *Law of Torts*, pp. 471–3; also Chafee, *Some Problems of Equity*, pp. 103 *et seq.*

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[5] [1956] A.C. 104; and see my article 'Damages for Wrongful Expulsion from a Trade Union' (1956) 19 *M.L.R.*, pp. 121 *et seq.* Such damages would not of course cover injury to reputation or exemplary damages.

[6] See *Tunney* v. *Orchard* (1955) 15 W.W.R. (N.S.) 49 (Manitoba Court of Appeal); and 34 *Can. B.R.* (1956), p. 70 (A. W. R. Carruthers). *Cf.* Sir A. Denning, *The Road to Justice* (1955), pp. 102–3: 'I suggest that where the law falls short is that it puts too much emphasis on the supposed contract between a man and his union and too little emphasis on his right to work.'

[7] For American law, see Chafee in 43 *Harv. L.R.* (1930), p. 933; and Summers in 64 *Harv. L.R.* (1951), p. 1049. Some recent American cases have shown a tendency to treat membership of a union as a kind of status, wrongful deprivation of which is actionable as a tort. But so far, the development seems not to have gone to the length of relying on pure tort, but rather on tort arising out of contract: cf. Stone in 34 *Can. B.R.* (1956), p. 1111, especially pp. 1116–19. An alternative basis might be to treat the deprivation of a man's right to work by wrongful expulsion, or its equivalent, as an intentional wrong in the absence of lawful justification. What would constitute such justification would have to be worked out case by case, as with the tort of wrongfully procuring a breach of contract, *e.g.*, proof of a bona fide reasonable mistake might be accepted as a valid defence.

[8] Trade Disputes Act, 1906, s. 4.

## GROUNDS OF INTERVENTION

I turn now to consider on what grounds the court will interpose assuming it has jurisdiction to do so. Here the general approach has been to emphasise that the court will not sit as a court of appeal from a decision of a domestic tribunal; it will not re-try the case or substitute its own view for that of the tribunal; on the contrary, it will limit its supervisory powers to seeing that the tribunal's proceedings were not conducted so as to infringe certain fundamental principles of natural justice.[10] This attitude is, of course, understandable enough in regard to the purely domestic and social types of conflict likely to arise from the expulsion of a member from his club. Whether it is adequate in the case of the type of economic conflict which may result in a man being excluded from his union or in some other way arbitrarily deprived of making his livelihood is a rather different matter.

## NATURAL JUSTICE

For the moment I want to confine myself to the so-called rules of natural justice. This phrase has not passed without criticism: thus Lord Shaw once referred to it by saying that 'in so far as it attempts to reflect the old *jus naturale* it is a confused and unwarranted transfer into the ethical sphere of a term employed for other distinctions; and in so far as it is resorted to for other purposes, it is vacuous.'[11] We all recall Scrutton, L.J.'s phrase about 'well-meaning sloppiness of thought'[12] and an Irish judge has more recently stated that, 'for me, natural justice means no more than justice without an epithet.'[13] Yet if the phrase itself is open to objection it remains true that it has formed a convenient rubric for denoting certain fundamental and well-established principles of procedure that any inquiry of a quasi-judicial character should observe if justice is to be done to the person concerned. These principles are easy to state if not always easy to apply. They are, that a person charged with misconduct should be given reasonable notice of any inquiry to be held; that he should be given a reasonable opportunity of making his defence; and that the decision should be reached honestly and without bias. Beyond this, however, the tribunal makes its own rules and procedure and its proceedings can be conducted with the utmost informality and without regard for the legal rules governing the admissibility or non-admissibility of evidence.[14]

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[9] *Bussy* v. *A.S.R.S.* (1908) 24 T.L.R. 437.

[10] See authorities cited in 13 *M.L.R.* (1950), pp. 381 *et seq.* (referred to *supra*, p. 42, n. 17. It is not clear whether natural justice has to be imported as an implied term of contract, or whether it is really imposed *ab extra* as a matter of public policy. The latter view seems preferable: *cf. Davis* v. *Carew-Pole, supra*, p. 45, n. 3.

[11] *Local Government Board* v. *Arlidge* [1915] A.C. 120 at 138.

[12] *Holt* v. *Markham* [1923] 1 K.B. 504 at 513.

[13] *Green* v. *Blake* [1948] I.R. 242 at 268, *per* Black, J.

These so-called principles are slight enough and one would have thought that they would be applicable to proceedings before any type of domestic tribunal whatsoever, representing, as they appear to do, the absolute minimum for the protection of the individual, and generally speaking, I think it has been assumed that they *are* universally applicable to any such proceedings. Unfortunately, however, some doubt was cast on this by certain dicta of Tucker, L.J., in the *Russell* case where he said: 'There are, in my view, no words of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.'[15] This is to throw the matter back into the melting-pot with a vengeance; but so far as I am aware these observations have in all the subsequent cases, until *Davis* v. *Carew-Pole,* been ignored, the court assuming that the meaning of natural justice is well-established by the authorities.[16] However, in *Davis's* case, Tucker, L.J.'s words were resurrected and used to support the rather different and perhaps questionable[17] proposition that a plaintiff cannot complain that an inquiry has been held in a manner contrary to natural justice if, on the facts of the case,

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[14] *Cf. supra,* n. 10.

[15] [1949] 1 All E.R. 109 at 118.

[16] But in relation to *statutory* tribunals exercising quasi-judicial functions, see the remarks of Lord Somervell in *Vine* v. *National Dock Labour Board* [1957] 2 W.L.R. 106 at 121–2.

[17] A similar view was, however, taken by Rinfret, J., in the Quebec case of *Marcotte* v. *Soc. Co-op. Agricole de Ste-Rosalie* [1954] B.R. 393 at 398. But see my comment on this case in 32 *Can. B.R.* (1954), p. 893, at p. 899.

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he has not been prejudiced.[18] All I desire to stress here is that if once we accept the view that there are no fixed canons of natural justice we may find ourselves in a position comparable to the early days of Equity, with natural justice varying according to the length of the judge's foot. Or as Professor Robson has expressed it, we shall exchange a small clear light for a series of guttering candles.[19] Such a result would certainly justify the strictures of Lord Shaw to which I have referred.

### PUBLIC POLICY

A rather happier development is the view reiterated on more than one occasion by Denning, L.J., that the rules of natural justice cannot be excluded by agreement, on the ground that a stipulation to condemn a man unheard would be invalid as against public policy.[20] This view has now been reinforced by the decision in *Lee* v. *Showmen's Guild*[1] to the effect that no stipulation making a private tribunal the final judge on matters of law, including the legal construction of a society's own rules, would be valid. It was also affirmed in *Lee's* case that although the court would not re-try the *facts* of the case, it would intervene if there was no evidence at all upon which the tribunal could have reached its finding.[2] A similar principle is already familiar in county court appeals, where it has occasionally afforded a wider scope for intervention than might appear at first sight.[3]

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[18] [1956] 1 W.L.R. 833 at 839. It should be noted that relief was accordingly granted not on the basis of a failure of natural justice but because the Stewards had, in expelling the plaintiff, misconstrued their own rules.

[19] *Justice and Administrative Law*, 3rd ed., p. 332.

[20] *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109 at 119; *Abbott* v. *Sullivan* [1952] 1 K.B. 198; *Bonsor* v. *Musicians' Union* [1954] 1 Ch. 479 at 485. As to the position where a rule permits the exclusion of a member in the absolute discretion of the committee and without a hearing, *quaere?* Such a rule might still be upheld provided there was no finding of misconduct: *cf. Russell* v. *Duke of Norfolk*, cited, *supra*.

[1] [1952] 2 Q.B. 329; see also *Baker* v. *Jones* [1954] 1 W.L.R. 1005.

[2] [1952] 2 Q.B. 329 at 340 (Somervell, L.J.), and at p. 343 (Denning, L.J.). It is uncertain, however, whether this would apply to a pure issue of fact, *e.g.*, did the plaintiff in fact commit the acts complained of? It has been held in regard to a statutory committee that a finding involving moral turpitude requires a high standard of proof (*Maharaj Krishan Bhandari* v. *Advocates Committee* [1956] 1 W.L.R. 1442). It seems clear that this would not apply to a non-statutory tribunal.

[3] See *e.g.*, *Selwyn* v. *Hamill* [1948] 1 All E.R. 70. For the difficult distinction between fact and law, see *British Launderers' Association* v. *Borough of Hendon* [1949] 1 K.B. 434 at 471; and *Edwards* v. *Bairstow* [1956] A.C. 14.

## THE PROSPECTS OF FURTHER DEVELOPMENT

When we consider the not inconsiderable developments that have occurred in this branch of law since the days of *Rigby* v. *Connol* in 1880,[4] and reflect on the increasing readiness of the courts in recent years to afford a remedy to the individual unjustly deprived of his right to work and of the means of making a livelihood, it may seem churlish to pause and consider whether even more could have been and perhaps may still be done within the traditional framework of the common law. Yet it must be borne in mind that the court still proceeds from the fundamental basis that it 'cannot be made a court of appeal' from decisions of domestic tribunals. But as I have pointed out this basis was constructed to meet the entirely different circumstances of a social club, for which it provided a reasonable enough starting point. 'The courts,' said Denning, L.J., in *Lee's* case,[5] 'have no wish to sit on appeal from their decisions . . . any more than from the decisions of a family conference. They have nothing to do with social rights and social duties. . . . It is very different with domestic tribunals which sit in judgment on the members of a trade or profession. They wield power as great, if not greater, than are exercised by the courts of law. They can deprive a man of his livelihood.' And in the recent case of *Huntley* v. *Thornton*, Harman, J., compared the union closed shop principle with the professional monopoly enjoyed by the English Bar. Such monopolies (he said) were only justified if they were so regulated as to promote the public interest; moreover the weapon of expulsion from such a society was a step of the most extreme gravity, only to be entered on after very careful inquiry and in the case of the very gravest offence.[6] This being so, might it not have been better if the courts had faced up to this distinction and ignored the approach in the club cases altogether? Why should the courts not have been prepared simply to acknowledge themselves judges over all the issues in the dispute, both fact and law, as they do in most other litigation which comes before them?

It may be and is sometimes said that the court does not desire, and that it would be impracticable or impolitic for it, to constitute itself the tribunal for deciding factual conflicts within the domestic arena of such bodies as trade unions, or trade or sporting associations. In fact, as recent cases show, not only are they frequently concerned in such disputes but this is a complete misuse of the concept of a 'domestic issue.' The word 'domestic' should be confined to its proper province of family or social disputes. The expulsion of a man from his union is, I need hardly say, very far from being a mere family quarrel. Then it is said that it might cause a flood of litigation in our courts if every expelled unionist could ask the courts to re-try his case. I confess that I find this argument a very curious one, especially when it comes from lawyers. The state of the lists is not so healthy at the present day that it can be suggested that the courts would be unable to cope with this new sphere of activity any more than it has failed to deal with fresh accessions of work from other sources in the past. In recent years at any rate no clamour seems to have been raised from any other quarter, such as among unionists, that the courts are unfairly or improperly exceeding their function in relation to domestic matters or tribunals, though Mr. James Griffiths was reported recently as expressing the pious belief of his party that these matters can be safely left to the responsibility of the unions themselves. But, as *The Times* commented, the grounds for this superstition he refrained from examining.[7] Complaints indeed are more often heard nowadays that the courts are unable to provide adequate remedies in these and similar matters.

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[4] *Supra,* p. 42, n. 15.

[5] [1952] 2 Q.B. 329 at 343. In America, the 'substantial evidence' rule is applied: see Summers in 64 *Harv. L.R.* (1950), p. 1049, at p. 1084.

[6] [1957] 1 All E.R. 234 at 239–40.

What real justification is there as a matter of public policy for this shrinking on the part of our courts from the exercise of the full jurisdiction vested in Her Majesty's judges? In the type of case most clearly analogous to those we are considering, namely wrongful dismissal of an employee, it has never been suggested—and indeed any such notion would be instantly scouted as monstrous and absurd—that the dispute is a merely domestic one and that the court should limit itself to seeing that the employer has given the employee a fair hearing and has not made any erroneous decision of law in dismissing the man. On the contrary, if wrongful dismissal is alleged, the court is naturally entitled to try the whole case and is final judge of every issue both as to law and fact. Why should the court not approach the expulsion cases, where a man's livelihood is at stake, in the same way? It certainly cannot be said to be too trivial a matter for the dignity of the court, since expulsion from a union may be and usually is far more serious than dismissal from a particular job. If a man can go to the courts on a claim to recover a debt of five shillings and have it fully investigated, why should he not be entitled to the same consideration when a sentence of economic death has been inflicted upon him?

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[7] See *The Times*, October 6, 1956.

Sometimes it is said that a so-called domestic tribunal, owing to its intimate knowledge of the conditions which prevail in the particular activity involved, is better equipped to deal with such disputes. What an extraordinary notion this is! For if there were any force in this idea there is hardly any sphere in which our courts would be left to operate at all. Men go to Her Majesty's courts not because they assume the judges have an intimate knowledge of every type of activity which may form the background of litigation, but because they expect to receive at their hands a fair and impartial hearing and a just decision in accordance with law, with a right of appeal if they think the decision is wrong. And although no doubt domestic tribunals normally do their job with 'care, skill and fairness,'[8] in many instances the very fact that the members are personally acquainted with the background of the dispute and possibly also possess strong views in regard to it, makes an impartial inquiry almost impossible. Yet the court does not insist on strict impartiality, and indeed it can hardly do so if a domestic tribunal is to be allowed to function at all. For as Lord Simon pointed out in *White* v. *Kuzych*[9]: 'It would, indeed, be an error to demand from those who took part the strict impartiality of mind with which a judge should approach and decide an issue between two litigants—that "icy impartiality of a Rhadamanthus" which Bowen, L.J., thought could not be expected of an engineer-arbitrator. . . . What those who considered the charges against the respondent and decided whether he was guilty ought to bring to their task was a will to reach an honest conclusion after hearing what was urged on either side and a resolve not to make up their minds beforehand on his personal guilt, however firmly they held their conviction as to union policy and however strongly they had shared in previous adverse criticism of the respondent's conduct.' A pretty tall order for the plain man you may think, and not one to inspire confidence in the accused. And an astonishing frame of mind for a tribunal of last resort vested with the power to deprive a man once for all of his livelihood. One is reminded of Dr. Johnson's comment after witnessing a court-martial, that he had much doubt of an enlightened decision; for perhaps there was not a member of the court who, in the whole course of his life, had ever spent an hour by himself in balancing probabilities.[10]

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[8] *Per* Somervell, L.J., in *Lee* v. *Showmen's Guild* [1952] 2 Q.B. 329 at 341.

[9] [1951] 2 All E.R. 435 at 438–9 (Privy Council). On the question dealt with in this case and much litigated in Canada, *viz.* in what circumstances is an expelled member first obliged to avail himself of any domestic right of appeal, before having recourse to the courts? see E. F. Whitmore in 32 *Can. B.R.* (1954), p. 201, and 34 *Can. B.R.* (1956), p. 188; and Stone in 34 *Can. B.R.* (1956), p. 1111, at pp. 1125–8.

## AN 'EXPANDING' COMMON LAW?

In his illuminating address to the Bentham Club last year Mr. Justice Devlin dwelt on the difficulties which face the developed common law in protecting the modern citizen against the all-powerful executive. His examination led him to the somewhat depressing conclusion that the influence of the common law 'has been receding and not expanding' and that the citizen had therefore little hope in many, if not most, of his dealings with the executive, of obtaining justice by process of law. This the learned judge attributes, not to timidity in the face of advances by the executive, but to voluntary withdrawal in the field of public policy as a whole. This recession, he says, is due to two reasons, *viz.*, the fact that the common law is obeying the law of its own nature and to the increase of parliamentary activity. As to the first, the growth of the law is impeded by the rigidity of precedent. 'Precedent when finally established, becomes as rigid as the branch of a tree. There are still young shoots that can be trained this way or that but the branch itself can only be lopped or pruned. Once the tree is fully grown the area which it can shade is determined and cannot be extended.'[11] Mr. Justice Devlin admits, however, that though, as he puts it, 'Our Lady of the Common Law . . . is not as young as she once was and that she cannot any longer indulge in activities which in her youth she would have taken in her stride,' where there remains room to manœuvre she can still move with the times.[12] I have ventured to suggest that in the sphere of domestic tribunals Our Lady of the Common Law has recently displayed a degree of sprightliness which indicates that if she has not actually gained a second youth, there is still more life in the Old Lady than Sir Patrick Devlin has given her credit for. With all respect, it does seem to me that Sir Patrick Devlin may be unduly gloomy when he 'offered us nothing but a death certificate.'[13] At the same time I hope my more sanguine view will not resemble those optimistic bulletins which, as Marcel Proust reminded us, are at once followed by the death of the patient.[14]

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[10] Boswell's *Life of Johnson,* anno 1780.

[11] 'Public Policy and the Executive' (1956) 9 *Current Legal Problems,* p. 11.

At all events, as I have indicated, we see here not only the field of public policy expanding rather than shrinking but also an active desire on the part of our courts to adapt the law where possible to the exigencies of our modern society. We all know that public policy is an 'unruly horse' but is there really any danger here of Her Majesty's judges galloping away too fast in this direction or—to adopt a phrase from another branch of the law—going off on 'a frolic of their own'? On the contrary, not only have there been recessions as well as advances in the recent cases, but the courts may, to a considerable extent, have hamstrung the lines of future developments by leaning too heavily on contract—as in the earlier days they rested themselves on property—to the exclusion of tort, and also by refusing to accept jurisdiction to re-try disputed issues of fact. Here indeed one sees the practical consequences of a too rigid system of precedent, but that there still remains some room for manœuvre can hardly be denied in the light of recent developments.

When we turn to the second reason given by Mr. Justice Devlin, the increase of parliamentary activity, there can, of course, be no dispute that Parliament is now recognised as the primary source of lawmaking in this country. It may also be conceded that this is as it should be. To quote Mr. Justice Devlin again: 'Judge-made law has the advantage that the judges feel their way step by step and so the law is tested empirically while it is being formed. But that has the disadvantage that all the steps are not always in the same direction and there may be prolonged periods of uncertainty while the course is being plotted. Sometimes the process ends up in a muddle that can only be cured by the legislature; . . . [but] at its best the common law is, I think, better than any statute could be.[15] Certainly in our present topic we can see many of these manifestations: the feeling the way step by step; the steps in different directions; and the uncertainty, but not, one still hopes, the muddle which can only be cured by the legislature. Indeed when one reflects on the subject of legislation in this field, is the conclusion not almost irresistible, that even if the legislature could be persuaded to face up to this issue, the wide range of activities comprised in the field of domestic tribunals; the political implications of the issues, especially where trade unions are involved—bearing in mind (as *The Economist* has remarked) that trade unions today are the 'sacred cow' of British political life[16]—make it practically impossible to deal with these questions effectively by Act of Parliament? Here at any rate, it may be suggested, is an admirable field for the courts to demonstrate that the common law is still not so lacking in vitality that it cannot recognise new rights and afford them protection, and that its solutions are 'better than any statute could be.' And the more room for manœuvre that is preserved the more chance there is that the common law will be able to meet this challenge and not find itself forced to send the common man away without a remedy for his injury. For if that is to be the result, it will be little consolation for him to be told that Parliament is too busy and the common law is too senile to attend to his needs.

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[12] At pp. 9 and 15.

[13] At p. 15.

[14] *Albertine Disparue,* cap. III.

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[15] *loc. cit.*, in n. 11 above, pp. 12–13. Austin's view on this subject is of some interest: 'I by no means disapprove of what Mr. Bentham has chosen to call by the disrespectful name of judge-made law. . . . That part of the law of every country which was made by judges has been far better than any part which consists of statutes enacted by the legislature. Notwithstanding my great admiration for Mr. Bentham, I cannot but think that, instead of blaming judges for having legislated, he should blame them for the timid, narrow, and piecemeal manner in which they have legislated' (*Lectures on Jurisprudence* (ed. Campbell), II, pp. 218–19). *Cf. supra*, p. 37, n. 6.

[16] *The Economist*, September 6, 1952, p. 536.

## 4

# THE INTERNATIONAL LABOUR ORGANISATION UNDER PRESSURE

L. C. Green

> 'The relationship of trade unionism with the State is one of the fundamental problems of modern society with far-reaching implications for constitutional law and for industrial law and relations. It is also a problem which lies at the heart of the ideological conflict which has split international society asunder.' [1]

During the First World War, especially under the influence of the upsurge of socialism and the impact of the Russian Revolution, there was a widespread recognition of the need to place labour relations on an institutional basis, in such a way as to give employers and workers, as well as governments, full opportunity to make their voices heard on issues relating to the conditions of labour. With this end in view an International Labour Organisation was established under Part XIII of the Treaty of Versailles. The Preamble to this Part of the Treaty drew attention to the fact that 'conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the . . . recognition of the principle of freedom of association; . . . [and that] the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.' These ideals were confirmed in the Declaration of Philadelphia adopted by the International Labour Conference at its Twenty-sixth Session in 1944, which affirmed the 'fundamental principles' that 'freedom of expression and of association are essential to sustained progress

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[1] Jenks, *The International Protection of Trade Union Freedom* (The Library of World Affairs, London), 1957, p. 6.

. . . [and that] the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to promotion of the common welfare.' In 1946 effect was given to the sentiments embodied in the Declaration of Philadelphia and an amended Constitution of the Organisation was adopted.

In accordance with the new Constitution,[2] the Members of the Organisation are those States which were already Members when the amended Constitution was adopted, together with all Members of the United Nations, whether original or admitted, 'communicating to the Director-General of the International Labour Office [their] formal acceptance of the obligations of the Constitution of the International Labour Organisation.' In addition, by a two-thirds majority of the delegates at a Conference, including two-thirds of the Government Delegates, other States may be admitted to membership of the Organisation. The membership provisions now in existence differ from those under the Treaty of Versailles. This merely provided, in Article 387, that 'the original Members of the League of Nations shall be the original Members of this organisation, and hereafter membership of the League of Nations shall carry with it membership of the said organisation.' Despite the reference to 'original membership,' no provision was made for the accession to membership of States which were not Members of the League of Nations, a matter to which Anzilotti drew attention in his Individual Opinion concerning *The Free City of Danzig and the International Labour Organisation* (1930).[3] The majority of the Court, however, appeared to assume that non-Members of the League could become Members of the Organisation, although Danzig was unable to do so because of the control exercised over its freedom of action in foreign affairs by Poland.[4] No such problem apparently arose under the new Constitution when Austria was admitted to the Organisation in 1947. At that time, in accordance with the Agreement of 1946 concerning the

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[2] 1 *International Labour Code,* 1951, p. 3.

[3] P.C.I.J., Series B, No. 18, p. 19.

[4] *ibid.,* pp. 10 and 13 *et seq.*

Machinery of Control in Austria,[5] 'all . . . international agreements which the Austrian Government wishes to make except agreements with one of the Four Powers, shall, before they take effect, . . . be submitted by the Austrian Government to the Allied Council,' which had thirty-one days in which to object. Similarly, four years later, while still under Allied occupation, Japan was admitted, after a letter had been received from General MacArthur as Supreme Commander for the Allied Powers stating that Japan would be able freely to ratify and apply International Labour Organisation conventions and recommendations and contribute to the expenses of the Organisation.[6]

States are able to withdraw from the International Labour Organisation in accordance with Article 1, paragraph 5, of the Constitution two years after having given notice to that effect to the Director-General, provided that they have by then fulfilled all their financial obligations to the Organisation. In July, 1947, the Director-General informed the International Labour Conference that Yugoslavia had served notice of intention to withdraw from the Organisation because, in the opinion of the Yugoslav Government, the structure of the International Labour Organisation was incompatible with the economic and social conditions of Yugoslavia. Other delegates expressed their hope that Yugoslavia would change her opinion before the two years had elapsed.[7] In fact Yugoslavia did not do so, although she resumed her membership in 1951.[8]

## THE STRUCTURE OF THE ORGANISATION

In order to understand Yugoslavia's reasons for wanting to withdraw it is necessary to examine the structure of the Organisation. According to Article 3 of the Constitution the General Conference of the Organisation consists of four representatives of each Member, 'of whom two shall be Government delegates and the two others shall be delegates representing respectively the employers and the workpeople' of the Member concerned,[9] and 'the Members undertake to nominate non-Government delegates and advisers chosen in agreement with the industrial organisations, *if such organisations exist,* which are most representative of employers or workpeople, as the case may be, in their respective countries.'[10]

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[5] Art. 6 (Cmd. 6958—1946, p. 23).

[6] *The Times,* June 22, 1951.

[7] 1 *International Organisation* (1947), p. 524.

[8] 5 *ibid.* (1951), p. 601.

[9] Para. 1.

The credentials of delegates may be challenged and if the challenge is sustained the delegate in question is denied admission to the Conference. Among the grounds most frequently alleged against delegates is the charge that proper consultation has not taken place between the Government and the organisations of the employers or workers, or that consultation has taken place with an organisation which is not the most representative of the country's employers or workers, or that the Member concerned denies freedom of association, now guaranteed by the Freedom of Association and Right to Organise Convention, 1948,[11] and the Right to Organise and Collective Bargaining Convention, 1949.[12] While it is true that these conventions only apply to those Members of the Organisation which have ratified them, the Preamble of the Constitution itself expressly recognises the principle of freedom of association and the Governing Body has established a Freedom of Association Committee whose task it is to examine allegations that Members are not respecting this fundamental principle of the Organisation.

Hardly a Conference of the Organisation has been held at which challenges have not been lodged against the credentials of some of the delegates, but in only one case has the question been carried as far as a request for an advisory opinion from the World Court. The first opinion for which the Permanent Court of International Justice was asked related to the *Nomination of the Netherlands Workers' Delegate to the Third Session of the International Labour Conference* (1922).[13] Five different labour organisations existed in the Netherlands, of which the largest was the Netherlands Confederation of Trades Unions, although its membership was only two-thirds of that of the other four combined. The Workers' Delegate to the first and second sessions of the Conference was chosen after consultation with the Netherlands Confederation of Trades Unions, but the Delegate for the third session was the common nominee of three of the other four organisations, whose combined membership was still greater than that of the Confederation and the fifth organisation. This nomination was objected to by the Netherlands Confederation of Trades Unions, which maintained that it was not in accordance with Article 389 of the Treaty of Versailles—now Article 3, paragraph 5 of the Constitution—for it considered itself, as the largest workers' organisation, to be the most representative and thus entitled to be consulted. The Court pointed out that while 'the persons nominated should have been chosen in agreement with the organisations most representative of employers or workpeople, . . . the most representative organisations for this purpose are those organisations which best represent the employers and the workers respectively. What these organisations are is a question to be decided in the particular case, having regard to the circumstances in each particular country at the time when the choice falls to be made. . . . The only object of the intervention of industrial organisations, in connection with the selection of delegates, . . . is to ensure, as far as possible, that the Governments should nominate persons whose opinions are in harmony with the opinions of employers and workers respectively,'[14] and it was not necessarily the largest organisations that were best able to fill this role.

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[10] Para. 5 (italics added).

[11] Arts. 856 *et seq.* (1 *International Labour Code,* 1951, pp. 679 *et seq.*).

[12] Arts. 870 *et seq.* (*ibid.,* pp. 690 *et seq.*).

[13] P.C.I.J., Series B, No. 1 (Hudson, 1 *World Court Reports,* p. 115).

Closely associated with this aspect of the problem of representation is the allegation that the so-called Workers' Delegate is really a representative of a non-existent organisation due to the denial of freedom of association. 'Such objections were raised at every session of the Conference from 1923 to 1938; in every case a majority of the Credentials Committee, consisting of the Government and Employers' members, considered that there was in the country concerned no workers' organisation, other than that in agreement with which the delegates was in fact appointed, which the Government ought to have consulted. The Workers' members, however, took the view that the organisation in agreement with which the delegate was appointed was not a workers' organisation within the meaning of the Constitution.'[15]

This was the position of the Italian Workers' Delegate from 1923 to 1935. It was alleged that the *Confederazione general del Lavoro* was a joint organisation of workers and employers, but the majority in the Credentials Committee accepted the Italian Government's statement that it was not a mixed organisation and that not a single employer was in possession of a membership card, and therefore 'consider that it is impossible to cast doubt upon the word of a Government on so clear and so important a point.'[16] This reliance on the truth of Government statements may be compared with the dissenting opinion of Judge *ad hoc* Ečer in the *Corfu Channel* (*Merits*) case (1949)[17] when he stated 'that in international law there is a presumption in favour of every State, corresponding very nearly to the presumption in favour of the innocence of every individual in municipal law. There is a *presumptio juris* that a State behaves in conformity with international law.' In the same way, in *Re Arton*,[18] Lord Russell, C.J., stated that 'the Court cannot permit you to argue the point that a friendly State is not acting in good faith . . .: that is not a question which the judicial authorities of this country have any power to entertain.' A similar attitude was adopted by Lord Goddard, C.J., as recently as 1952.[19] Despite the refusal of the Credentials Committee to unseat the Italian Workers' Delegate, persistent efforts continued to be made to achieve this end. The Credentials Committee held, however, that the issue was the same as had been heard in 1923 and was therefore *res judicata*, and it maintained this opinion even when reference was made to the violence used by Fascist organisations as indicative of the difficulties placed in the way of the free exercise of trade union activity. The Committee was of opinion that the 'Confederation of Fascist Corporations . . . is a workers' organisation which deals with occupational questions, and is the most representative organisation, since it comprises approximately two million workers.'[20] From 1936 no further protest was made against the Italian Workers' Delegate.

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[14] Hudson, *op. cit.*, p. 119 at p. 120.

[15] Report of the Committee on Freedom of Employers' and Workers' Organisations (*McNair Report*), Governing Body, 131st Session, 1956, p. 14. See below, pp. 78 *et seq.*

It was not only against the Italian Workers' Delegate that objections of what might be called a political character were raised. In 1933, Dr. Ley was nominated as the German Workers' Delegate to the Seventeenth International Labour Conference. The International Federation of Trades Unions, together with the Workers' Delegate on the Credentials Committee, drew attention to the nature of the Nazi rise to power and maintained that the German workers had no opportunity to manifest their views. The Credentials Committee was saved the need of coming to any decision as the entire German delegation withdrew from the Conference and did not appear again so long as Hitler was in power,[1] for Germany's withdrawal from the League did not affect her membership of the Organisation any more than did the withdrawal of Brazil in 1928.

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[16] Record of Proceedings of Fifth Conference, 1923: 5 RP 1923, 250.

[17] *I.C.J. Reports 1949*, p. 4, at p. 119.

[18] (No. 1) [1896] 1 Q.B. 108 at 110.

[19] *Re Government of India and Mubarak Ali Ahmed* [1952] 1 All E.R. 1060 at 1063.

[20] 6 RP 1924, 524; 7 RP 1925, 586; 8 RP 1926, 308; 9 RP 1926, 457; 10 RP 1927, 473; 11 RP 1928, 528; 12 RP 1929, 670; 13 RP 1929, 272; 14 RP 1930, 557; 15 RP 1931, 532; 16 RP 1932, 571; 17 RP 1933, 481; 18 RP 1934, 517; 19 RP 1935, 718.

Other countries against whose Workers' Delegate a continuous barrage of objections was maintained were Bulgaria, Greece and, periodically, Estonia, Latvia and Lithuania. The ground of the complaint in these cases was that the organisation which the Workers' Delegate purported to represent was nothing but an institution 'set up and supervised by the Government' which could not be regarded as possessing 'the character of a workers' trade union organisation able to elect its representatives freely.'[2] The majority on the Credentials Committee consisting of the Government and Employers' Delegates did not accept these arguments, and after 1938 the Workers' Delegates no longer divided the Committee.

Since the Second World War two successful complaints have been made against Workers' Delegates. The 1945 Conference refused to admit the Argentine Workers' Delegate on the ground that the workers' organisations in Argentina were denied freedom of association, of action and of speech.[3] Perhaps this was the reason why, in 1951, the General Confederation of Labour of Argentina lodged a complaint against Hungary before the Governing Body Freedom of Association Committee because of the Hungarian Government's deportation of workers to the Soviet Union. It was alleged that these deportations constituted a complete denial of workers' rights, but the Committee pointed out that an allegation in the field of human rights was not as such a question concerning trade union rights.[4] The other case concerned Venezuela, the Workers' Delegate of which was excluded in 1950 because 'it was impossible for the Government to reach agreement on the nomination of the Workers' Delegate with the organisations which should have been considered most representative, since they were at that time dissolved.'[5] In both Argentina and Venezuela there had been revolutions shortly before and the new governments had dissolved the trade unions. At later sessions the Credentials Committee refused to exclude these Delegates, in the Argentine case on the ground that the evidence lodged by the objectors was insufficient, and in the Venezuelan case because the Governing Body Freedom of Association Committee had found that there had been developments in the position of trade unions in that country, although the question of freedom of association in Venezuela was still being examined by the Committee.[6]

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[1] 17 RP 1933, 485.

[2] 19 RP 1935, 719; 21 RP 1936, 191; 23 RP 1937, 546, 548; 24 RP 1938, 466.

[3] 27 RP 1945, 309.

On occasion, the Freedom of Association Committee, whose task it is to examine these allegations, has absolutely refused to consider any complaint when it considered that its motivations were purely political. This was what happened in Case 37 concerning British Honduras. The Committee declared that the allegation was 'so purely political in character that it is undesirable to pursue it further by means of the procedure for examination of allegations concerning the infringement of trade union rights.'[7] In other instances, the Committee has been just as dogmatic to the opposite effect. Thus, in Case 55, which arose from allegations brought against Poland by the International Confederation of Free Trades Unions, 'the Committee, having before it precise allegations that the situation in Poland is incompatible with the principle of freedom of association to which the Polish Government refuses to reply, recommends that the case merits further examination by the Governing Body.'[8]

The Venezuelan situation reached its culmination in 1955 during the Fifth Session of the Petroleum Committee of the International Labour Organisation at Caracas, when Venezuela gave notice of withdrawal from the Organisation. The Governing Body had decided in 1954 to hold this Session in Caracas despite the opposition of the entire Workers' Group which argued that there was complete 'absence of freedom of association in Venezuela,' evidenced by the arrest and imprisonment, often without trial or charge, of trade union leaders, and that the Government of Venezuela had failed to fulfil the undertakings it had given.[9] Many Workers' Groups refused to send any representatives to Caracas, but Mr. Vermeulen, the representative of the Workers on the Governing Body, not only attended himself but persuaded some of the national labour groups to attend as well.

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[4] Case 35, *Sixth Report of the I.L.O. to the United Nations*, 1952, Appendix V, p. 191.

[5] *McNair Report*, p. 15.

[6] *ibid.*

[7] *loc. cit.*, n. 4, above, pp. 170–1.

[8] *Eighth Report of the I.L.O. to the United Nations*, 1954, Appendix II, p. 199.

In his speech of welcome the representative of the Venezuelan Government referred to attempts that had been made to get the meeting cancelled and to discredit Venezuela in the eyes of the world. In his reply Mr. Vermeulen called on the Government to introduce more freedom of association and to release the trade union leaders then in gaol or to bring them to trial. The representative of the Government protested at this speech and challenged its accuracy. Nevertheless, Mr. Vermeulen telegraphed to the International Confederation of Free Trades Unions that he had delivered his speech as drafted, and this telegram was regarded by the Government as proving that the speech was a deliberate and premeditated affront in the presence of Ministers. Venezuela declared the presence of the Workers' Delegate to be no longer desirable, asked him to leave and, it seems, interfered with the freedom of communication of the Chairman of the Committee. An immediate protest was lodged against this breach of the immunity of a member of the Governing Body and against the affront to the Governing Body and to the Organisation itself. The Chairman of the Committee pointed out that Mr. Vermeulen had attended the meeting despite trade union opposition and that the speech had been intended to make his own position clear. The Chairmen of the Governments' and the Employers' Groups recommended the termination of the meeting, even though they did not necessarily agree with the sentiments expressed, and the Director-General of the Organisation accepted this proposal.[10] As a result, as already indicated,

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[9] Governing Body, 129th Session, 1955, Appendix XXI, p. 125.

[10] *ibid.*, pp. 126–9.

Venezuela announced its withdrawal from the International Labour Organisation, although in 1956 the Governing Body decided to instruct the fact-finding and conciliation commission to investigate allegations of continuing repression of the trade unions in that country.[11]

In 1947 a Convention on the Privileges and Immunities of the Specialised Agencies was adopted by the General Assembly.[12] This, however, has not been ratified by Venezuela. Nevertheless, Venezuela is obliged—or was at the date of the Caracas meeting—to respect the immunity of the Organisation and its officials, for by Article 40, paragraph 2, of the Constitution it is provided that 'Delegates to the Conference, members of the Governing Body and the Director-General and officials of the Office shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organisation.' When the matter was considered in the Governing Body, the Netherlands Government Delegate pointed out that it had not intervened on behalf of Mr. Vermeulen, even though Dutch rights as a Member of the Organisation had also been infringed, as he was a representative of the International Labour Organisation and it was for that Organisation to act.[13] By adopting this attitude the Government of the Netherlands was complying with the Advisory Opinion rendered by the World Court on *Reparation for Injuries Suffered in the Service of the United Nations* (1949) arising out of the murder of Count Bernadotte.[14] In that Opinion, the court recognised the possibility of 'competition between the State's right of diplomatic protection and the Organisation's right of functional protection. . . . There is no rule of law which assigns priority to the one or to the other, or which compels either the State or the Organisation to refrain from bringing an international claim, [but] the Court sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense. . . . Although the bases of the two claims are different, that does not mean that the defendant State can be compelled to pay the reparation due in respect of the damage twice over. . . . The risk of competition between the Organisation and the national State can be reduced or eliminated either by a general convention or by agreements entered into in each particular case. There is no doubt that in due course a practice will be developed, and it is worthy of note that already . . . States . . . have shown a reasonable and co-operative disposition to find a practical solution.'[15]

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[11] *The Times,* November 26, 1956; *I.L.O. News,* January, 1957.
[12] 33 *United Nations Treaty Series,* p. 261.
[13] *loc. cit.,* n. 9, p. 65, above, p. 30.
[14] *I.C.J. Reports 1949,* p. 174.

All the issues so far considered were connected with the maintenance of the independence of Delegates and the tripartite character of the Organisation. If Delegates are not completely independent, the entire balance of representation is disturbed. It creates a situation which would be incompatible with the sovereign equality of all the Members of the Organisation, for it indirectly increases the governmental representation of the Member concerned. As a concomitant of this, one of the three estates of labour—Government, employers and workers—would remain unrepresented.

### COLLECTIVIST STATES AND THE I.L.O.

It was this problem of equal representation that was primarily responsible for the decision of the Yugoslav Government to withdraw from the Organisation in 1947.[16] But side by side with the tripartite principle is the equally fundamental necessity to achieve universality and, as has been indicated above, the other Members of the Organisation sought to persuade the Yugoslav Government to rescind its notice of withdrawal.

Universality does not always mean the acquisition of the largest number of members possible.[17] The Preamble of the Organisation's Constitution itself emphasises that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.' This is bound to be the case if economic competition is to remain possible. It has been said of the I.L.O. that 'universality goes beyond the question of the number of States which are Members of the Organisation. Paramount in that concept is the idea that the aims and purposes of the I.L.O. and the action that it takes must correspond with the needs of all the people throughout the world, whatever social or economic régime exists in their countries. The principle of universality means also that the functioning of the I.L.O. should not be designed solely to fit any given social system or to impose a pattern of social structure to be uniformly applied; but it must maintain its purpose to help the governments and peoples of all countries to develop solutions to the labour problems that exist in their own special circumstances. In fact, the activities of the Organisation are required to adapt themselves to all possible forms of the life of those nations which have voluntarily accepted its aims as set forth in the Constitution. Its Constitution provides adequate scope for such adaptation.'[18]

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[15] *ibid.*, pp. 185–6.

[16] See text to notes 7 and 8, p. 59, above.

[17] *Cf.* Schwarzenberger, *The League of Nations and World Order*, 1936, and *Power Politics*, 1951, pp. 430–43; Green, 'Membership in the United Nations' (1949) 2 *Current Legal Problems*, pp. 258–64.

The Legal Adviser of the Organisation has expressed the same principle in slightly different terms: 'The Constitution is based upon a delicate balance between the tripartite principle and governmental responsibility, and in examining the problems as they arise both of these elements in the constitutional framework and tradition of the Organisation must be accorded proper weight.'[19]

The problems envisaged in these comments came to the fore in a most marked fashion long before the Yugoslav desire to withdraw, with the admission of the Soviet Union to the League of Nations and its advent in the International Labour Organisation. Before examining the objections that have been made at various times to both the Employers' and Workers' Delegates from the Soviet Union and other States possessing a socialist economy, it is as well to look briefly at the economic structure of the Soviet Union which may be taken as the example on which the others have based their social structure.

By Article 126 of the Soviet Constitution[20] 'citizens of the U.S.S.R. are guaranteed the right to unite in . . . trade unions . . .; and the most active and politically conscious citizens . . . unite in the Communist Party of the Soviet Union, which is the . . . leading core of all organisations of the working people,' and the trade unions therefore conduct all their activities under its guidance.[1] 'Employers' organisations do not exist in the sense in which that expression is used elsewhere. . . . The only organs resembling employers' organisations . . . seem to be bodies of a

[18] 38 RP 1954, Appendix II, pp. 436–7.
[19] *op. cit.*, n. 1, p. 57, above, p. 87.
[20] Peaslee, 3 *Constitutions of Nations*, 1956, p. 499.
[1] *McNair Report*, p. 121.

more or less technical character formed by members of the managerial class. . . . [As for workers' organisations] they are very powerful. . . . The documents [submitted by the Soviet Union to the McNair Committee] give the impression that the organisations of workers in their hierarchy are well able to look after themselves and not likely to be subject to domination and control by the Government. . . . There are today no employers in the ordinary sense of the word . . . and any association to which they may belong are not "employers' organisations" in the ordinary sense of that term. . . . The difference in function between the employing classes in the majority of countries and the managerial class in the Soviet Union . . . is that while such classes are concerned with ensuring the efficient management and development of industry, the latter are not concerned with the protection of the interests of private capital because there is no private capital to protect. Nevertheless, it appears that within the sphere of a particular industry, or part of an industry, these managers have extensive powers and discretions and responsibilities and that a great deal is left to their independent management within the limits of the overall economic plan.'[2] Once again it is valuable to refer to the comments of the Legal Adviser, for Dr. Jenks has pointed out that 'the Constitution of the Organisation provides for the representation of functions and not for the representation of classes.'[3]

Similarly, on the basis of the information supplied by the Soviet authorities Cornelius, J., a member of the McNair Committee, came to the conclusion that the trade unions, too, were independent bodies:

> 'Being in themselves autonomous, and being granted also the faculty of nominating candidates to the superior legislatures, the trade unions clearly possess a status in the life of the country, of which all potentialities and powers in the country must necessarily take notice. It is not easy to conceive, in such circumstances, of the Government acting one-sidedly to curtail the freedom or regiment the activities of the trade unions, in the sense carried by the words "domination and control." The texture displays mutual

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[2] *ibid.*, pp. 202–5.

[3] Memorandum by Legal Adviser of I.L.O. to Committee on Constitutional Questions of the Governing Body, January, 1945, para. 18, 27 *Official Bulletin* (1945), p. 111, at p. 125.

> inter-dependence, and the inference as to the relationship must incline rather towards co-operation than to that assumption of mutual isolation which is the idea of oppression or forceful subordination.'[4]

Cornelius, J., is not to be blamed for having failed to foresee the developments in Hungary in November, 1956. In the same month the Governing Body expressed its support for the condemnation by the United Nations of these events,[5] and at the same time expressed approval of Polish proposals to liberate the Polish trade unions.[6]

In 1936 the Workers' Group welcomed the entry of the Soviet Union as 'another step in the direction of universality,' but went on to express the hope that the 'Workers' Delegations of each country should be constituted in such a way as to represent independent organs of the working class.'[7] It was in the following year that doubts and objections first received articulate expression. The Employers' Group questioned, but did not challenge, whether the Soviet Employers' Delegate to the Twenty-first Conference on Maritime Questions had been appointed in accordance with the principles of the Constitution, or was, as they thought, really a Government nominee. The Credentials Committee pointed out that the Constitution of the I.L.O. requires consultation only when organisations exist.[8] An objection was lodged against the Workers' Delegate by the International Federation of Christian Trade Unions, but the Credentials Committee rejected it, noting 'that the nominations . . . had been made on the recommendation of the Central Trade Union Council of the U.S.S.R., and that no evidence had been submitted . . . that there exists at the present time any other organisation representing workers with which it would have been the duty of the Government to come to an agreement for the purpose of the nomination of the representative of the workers of the U.S.S.R.'[9] The outbreak of the Second World War and the expulsion of the Soviet Union from the League of Nations put a temporary end to discussion about the correct representation of the Soviet Union, for the Organisation noted the expulsion and, since no steps had been taken by the Soviet Union to preserve its membership, it was taken to have lapsed.

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[4] *McNair Report,* Note by Cornelius, J., p. 208, at p. 225.

[5] GB 133–16–16, 133rd Session, November, 1956; *The Times,* November 23, 1956; *I.L.O. News,* January, 1957.

[6] *The Times,* November 23, 1956; *I.L.O. News,* January, 1957.

[7] 20 RP 1936, 542–3.

[8] Governing Body, 78th Session, 1937, Appendix 20, pp. 160–2.

[9] 23 RP 1937, 543.

During the War the I.L.O. in exile adopted a number of resolutions relating to the post-war activities of the Organisation. In November, 1941, five months after the German invasion of the Soviet Union, the International Labour Conference adopted a Resolution on Collaboration between Governments, Workers and Employers.[10] This declared 'that real collaboration is possible only within the framework of democratic political institutions which guarantee the freedom of association of workers and employers; affirm[ed] that the application of the principle of collaboration requires that in law and in fact the right of industrial organisations to represent workers and employers should be recognised by the State; . . . [and] recognise[d] that methods of collaboration vary with place, social pattern, prior experience, temperament and custom, from country to country and within the experience of a single nation, . . . and that positive results can best be assured by development along the lines of national experience.' This was followed by the decision of the 1945 Conference to appoint a Delegation on Constitutional Questions to examine the extent to which the Constitution of the Organisation required amendment.

By now it was clear that it was not only States with a completely socialist economy which might cause difficulty, but that States with mixed economies would also present problems. The Delegation considered two proposals directed at giving representation to socialised management in countries with mixed economies. In the first place it was suggested that there should be two Government Delegates, two Workers' Delegates, one of whom might represent the minority organisation, and two Employers' Delegates, one of whom could come from nationalised industry. The second proposal was that there should be 'two Government Delegates, one representing nationalised undertakings and State economic institutions of different kinds, on the understanding that, if no such institutions exist, the two Government Delegates would represent the general policy of the State, one Employers' Delegate representing private undertakings, and two Workers' Delegates, one of whom would be a representative of the national trade union organisation, while the other would be recommended by the same . . . organisation, but would belong to a State economic undertaking, where such undertakings exist. . . . In countries where there are no private undertakings there would be one delegate representing State undertakings and two Government Delegates in addition to the two Workers' Delegates.'[11] The Delegation also had before it a Memorandum from the Legal Adviser, in which it was stated that 'the Organisation is not incapable of adapting itself to the changing requirements of a changing world; its success hitherto has been largely due to the capacity which it has shown for unceasing adaptation to the evolving needs of a world for change; but it is imperative that any necessary change should be effected in a regular manner and only after the case for the proposed change has been established to the general satisfaction. Any attempt to modify the Constitution of the Organisation in any other way would involve a violation of the very special body of law relating thereto; and this very special body of law is a faithful reflection of underlying political realities, such as the necessity, if the Organisation is to remain capable of discharging the functions for which it was created, that any modification of the Constitution should command the support of those most directly affected by decisions of the International Labour Conference.'[12]

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[10] 2 *International Labour Code,* 1951, p. 27.

Finally, the Delegation, after asserting flexibility to be the first essential of a good Constitution, opposed any change in the basis of representation. This was accepted by the Committee on Constitutional Questions of the Montreal Conference, 1946, which expressed its 'unanimous wish . . . to make it clear that the International Labour Organisation desires and will welcome the active participation in the Organisation of all the Members of the United Nations and of all important sections in the labour movement of all member States.'[13] The Conference also approved that part of the Committee's report which recorded the fact that before the War the Employers' Group had questioned but not challenged the Soviet employers' representative, although they now shared the general desire that the Soviet Union should resume its participation in the Organisation, well aware that if it did so the employers' representative would in fact be a representative of socialised management in the Soviet Union. The employers felt, however, that Soviet management should be represented by advisers attached to the Government delegation or, in the case of mixed economies, by advisers attached to the employers' representative.[14] In view of the general feeling that adequate means already existed to cover the membership of States regardless of their economic or social structure, the representation clauses of the Constitution were left unamended.

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[11] *McNair Report,* pp. 8–9.
[12] *loc. cit.,* n. 3, p. 69, above, para. 44, p. 140.
[13] *McNair Report,* p. 9.

In 1953 the Soviet Union sought to rejoin the Organisation but added conditions to its membership, declining to accept the jurisdiction of the World Court to interpret the Constitution and Conventions of the Organisation and refusing to be bound by decisions of the Organisation reached before the Soviet Union became a member.[15] The Director-General informed the Soviet Union that the Constitution made no provision for only partial membership. In 1954, therefore, the Soviet Union accepted unconditional membership of the International Labour Organisation, as did Byelorussia and the Ukraine.[16]

### THE COLD WAR AND THE I.L.O.

Before considering the impact of the cold war upon the International Labour Organisation it is advisable to recall the opinion of the International Labour Office which considered the problem of non-Government delegates in 1937[17]:

> 'The participation of non-Government elements in the Conference is a characteristic feature of the working of the International Labour Organisation. The object of the Organisation is the protection of the workers through the implement of the conditions of work. It is therefore normal that the workers should be represented. Conditions of work, however, do not only affect workers. In a general way and another form they concern the employers, and it is for this reason that the Constitution has provided for an identical representation of the employers and of the workers. The balance between the employers' and the workers' elements was considered essential by the Constitution of the

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[14] 29 RP 1946, Appendix 6, p. 359.

[15] 37 *Official Bulletin* (1954), pp. 229–30.

[16] *McNair Report*, p. 12.

[17] Governing Body, 78th Session, 1937, Appendix 20, pp. 160–3.

> Organisation itself, which lays down in Article 4 that if a non-Member has not nominated one of the non-Government delegates whom it is entitled to nominate, the other is not entitled to vote. . . . The representation of employers and workers should not be considered as an expression of inevitable opposition between them but rather as a means of ensuring the necessary adaptation of their interests. This conception is in the opinion of the Office correct in all cases and particularly when the labour régime takes a socialised form or is otherwise brought under State control. . . . The social function of the employer may be carried out by a collective body (notably by the State) just as well as by individuals. It can hardly be questioned that this function exists under a socialist as under a liberal system. The worker, from the very fact that he works, almost always has an employer; and that employer—whether a collectivity or an individual—has as much the right to participate in the working of the International Labour Organisation under the Constitution. . . . There is only one consideration which must be fulfilled in such a case, the competent authorities of the State must be sufficiently distinguishable to enable a distinction to be made between the Government and the State. . . . The terminology of the Constitution of the International Labour Organisation is consistent with this principle [as is the Charter of the United Nations]: while each Member (that is to say, each State) is represented at the Conference by four delegates, only two represent the "Government." The two others represent the workers and the employers, and it is of no great importance for the application of the Constitution and its principles whether the employer is the State or an individual.'

The Office then pointed out that the sole item on a Conference agenda might be the regulation of work on railways, which is a Government monopoly in many of the Members of the Organisation:

> 'When the workers are employed in the service of the State, it is an official of the State who can and must represent the employers, for in that case the notion of the State and the notion of the employers are one and the same. . . . The character of the International Labour Organisation,

> which is referred to as "permanent" in the Treaties [of Peace terminating the First World War], must be borne in mind. The term shows that its activities are required to adapt themselves to all possible forms of the life of the nations, and cannot be hedged round with rigid and abstract formulas. The fact that the particular social organisation of a State brings a new element into the working of the Conference does not in itself run counter to any principle of the Constitution.'

In 1954 objections were lodged against the Workers' and Employers' Delegates from the Soviet Union, Bulgaria, Byelorussia, Czechoslovakia, Hungary, Poland and the Ukraine, but for the purpose of analysis it is sufficient to consider the position of the Soviet Union. The International Confederation of Free Trade Unions claimed that the Soviet organisations were not independent of State or Party, but were part of the administration and subservient to State organs and not trade unions at all. The majority of the Credentials Committee considered that it was not really competent to make a full examination of the allegations concerning freedom of association and subservience. They considered that their sole concern was that the nomination should have been in compliance with the Constitution which merely requires consultation with representative organisations '*if such organisations exist*'; it is enough if only one exists and there was insufficient evidence to show that it did not represent the bulk of the workers.[18] The majority also cited the opinion of 1937 and the comments on universality already referred to, and their view was accepted by the Conference.

Similar objections were lodged against the Soviet Employers' Delegate who was Director of the 'Dinamo' Plant, but this objection was overruled on the ground that he represented the people whose functions most closely approached those of employers.[19] A like objection had been made in 1953 to the Czechoslovak Employers' Delegate who came from the Ministry of Heavy Engineering and was rejected on similar grounds.[20] The rejection of their objection did not terminate the efforts of the Employers' Group. The Soviet Employers' Delegate was omitted from various committees and the Selection Committee suggested his appointment as a Deputy Member. The Soviet Union countered by asserting that this meant that the 'Selection Committee recognises their right to take part in the work of the committees. If the Selection Committee admits the rights of such delegates to take part in the work of such committees there is no reason to restrict these rights, because the Standing Orders provide that all delegates shall have equal rights, even those whose credentials have been contested. Therefore, the Selection Committee has taken a false stand.'[1] The Soviet proposal to omit the word 'deputy' was defeated.

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[18] 38 PR 1954, Appendix 2, pp. 440–1.

[19] *ibid.*, p. 436.

[20] *ibid.*, p. 433.

The basic reason for the opposition to the Soviet Employers' Delegate was made clear by the Employers' Delegate from the United States:

> 'The challenging of the sitting on committees of so-called Employers' Delegates from the seven totalitarian countries is, in effect, a challenge to the right of these countries to remain Members of this Organisation. . . . The International Labour Organisation concept from the very beginning was that the Employers' delegates to this body should represent free associations of free employers. . . . I charge that the purpose of the re-entry of Russia into the I.L.O. is to disrupt this Organisation and to use it as a spring-board for Communist propaganda. Unless steps are taken immediately to preserve the status of the tripartite structure of this Organisation, as originally conceived and practised for so many years, it is my intention to recommend to my Government, to my nominees, and to the employers of the United States, that they refrain in future from sending Employers' delegations to sessions of the Conference.'[2]

He further pointed out that in sixty-two votes over the last five years all the representatives from Poland and Czechoslovakia had voted as one man.

Despite these brave words, the United States Employers' Delegate did in fact attend the 1955 Conference. Once again the Employers' Group omitted any representative of Eastern Europe from the various committees and again the Selection

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[1] 37 PR 1954, p. 69, see also p. 423. See, also, Jenks, *op. cit.*, n. 1, p. 57, above, pp. 109–32.

[2] *ibid.*, pp. 71–2.

Committee appointed them as deputy members. On this occasion the United States Employers' Delegate declared that 'no member of the United States Employers' delegation would sit in any committee with a so-called Employers' Delegate or adviser from an Iron Curtain country. If one was named to a committee, members of the United States Employers' delegation would withdraw from that committee.'[3] In fact, the United States and Greek Employers' Delegates did withdraw.[4] In 1956, the objections were repeated and this time Roumania was added to the list of totalitarian States. It was held in the case of all except Roumania that the objections were not receivable as they were identical with those dealt with in 1954.[5] The objection against Roumania was also rejected, as was that against the Spanish Workers' Delegate.[6]

It was not only in the International Labour Conference that the Employers' Delegates refused to sit with those who came from Eastern Europe. At the first European Regional Conference of the International Labour Organisation in 1955 the employers were unable to challenge the Employers' Delegates from the Soviet Union and its satellites as such challenges could not be made effective during sittings of the Conference. They stated that they regarded these delegates as indistinguishable from Government Delegates and therefore omitted them from the committees. On the proposal of the United Kingdom Government, however, the Conference agreed to appoint them as deputies. As a result, the Employers' Delegates ceased to co-operate in the work of the committees, although they participated in the plenary debates on the committees' reports.[7]

The Eastern European countries did not allow these attacks to pass unanswered. In 1955 the Soviet Union and her satellites opposed the representation of China. The Credentials Committee considered this to be an essentially political question and declared that pending a lead being given from the United Nations, the I.L.O. should not take independent action. It did not deny that the Organisation could act on its own if it wished, but it was of opinion 'that independent action would be undesirable, having regard to the existing relationship between the International Labour Organisation, the United Nations and the other specialised agencies. . . . In a political question of such a controversial nature the United Nations and the specialised agencies should if possible adopt a uniform attitude' and the objections were therefore rejected.[8] In 1956 the Conference affirmed its position regarding China.[9]

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[3] 9 *International Organisation* (1955), p. 546.
[4] *New York Times*, June 7, 1955.
[5] 74 *International Labour Review* (1956), p. 317.
[6] *ibid.*, p. 318.
[7] Governing Body, 128th Session, 1955, Appendix 2, pp. 72–3.

Traces of the cold war are also to be found in the attitude of the Conference to the non-payment of subscriptions by Hungary and China. By Article 13, paragraph 4, of the Constitution, 'a Member of the Organisation which is in arrears in the payment of its financial contribution to the Organisation shall have no vote' in the various bodies of the Organisation if its arrears exceed two years' contributions. By a two-thirds majority, however, the Conference may waive this disqualification if it is satisfied 'that the failure to pay is due to conditions beyond the control of the Member.' In 1955 both China and Hungary asked permission to vote without paying the arrears due from them since 1953. In the case of Hungary it was decided that there was lack of evidence to show that failure to pay was due to conditions beyond that country's control.[10] In June, 1957, Hungary withdrew from the Conference after the credentials of its representatives had been rejected.[10a]

### THE MCNAIR REPORT

The various protests that had been made concerning the lack of independence of various Workers' and Employers' Delegates associated with allegations that freedom of association was denied to both workers' and employers' organisations by many of the Members reached their peak in 1954. The Workers' Group proposed that the Governing Body should establish a tripartite committee to examine the membership provision of the Organisation's Constitution and 'make proposals for such amendments as would ensure that Worker and Employer representatives could only be appointed after nomination by organisations of workers and employers which are free and independent of their governments.' This proposal was supported by the

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[8] 39 PR 1955, Appendix 2, pp. 528–9.
[9] *loc. cit.*, n. 5, p. 77, above, p. 318.
[10] *loc. cit.*, n. 3, p. 77, above, p. 547.
[10a] *Manchester Guardian*, June 27, 1957.

Employers' Group.[11] By 1956 the Workers' representatives had changed their attitude and the Employers' Group in the Governing Body found itself alone in supporting this proposal, while the Workers advocated on-the-spot surveys of conditions in the totalitarian countries.[12] In 1955, instead of adopting this proposal, the Governing Body, having pointed out that tripartite representation was an essential feature of the Organisation and that the relations between governments and workers' and employers' organisations varied from country to country, asked the Director-General to appoint an independent committee to prepare 'a report covering the membership of the I.L.O. regarding the extent of the freedom of employers' and workers' organisation from government domination or control.'[13] This committee, under the chairmanship of Lord McNair, produced its report covering over 2,000 pages in February 1956. The bulk of the *McNair Report* consists of monographs dealing with the position concerning freedom of association within the territory of each Member of the International Labour Organisation.

As the basis of its survey the Committee took the principles of the Conventions on Freedom of Association and Right to Organise, 1948,[14] and on the Right to Organise and Collective Bargaining, 1949.[15]

The Committee found that the restrictions upon freedom of association practised by the Members of the Organisation were almost as varied and manifold as the pieces in a kaleidoscope. This becomes obvious if one bears in mind, what the Committee itself pointed out, that 'any government which desired to exercise domination or control over employers' and workers' organisations could find a variety of means of doing so which no constitutional provision and no Convention or legislation could effectively exclude.'[16] In the public sector of industry, for example, Government participation might be by way of direct intervention in the management of industry; by the creation of public corporations with some of the officers nominated by the

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[11] *McNair Report*, p. 1.

[12] *The Times*, November 21 and 23, 1956. For a general survey of the impact of East–West relations on the 1956 session, see the British white paper, Cmnd. 36—1957.

[13] 128th Session, 1955, *McNair Report*, p. 2.

[14] *loc. cit.*, n. 11, p. 60, above.

[15] *loc. cit.*, n. 12, p. 60, above.

[16] *McNair Report*, p. 25.

Government, and responsible to it; by the formation of mixed companies under State control or in which the State enjoys special powers; or by way of concessions granted to private operators to fulfil public utilities on terms of accountability, often accompanied by the Government reserving the right to nominate members to the board.[17]

Among the restrictions examined by the Committee were those on recruitment. Thus in Iraq only nationals may join trade unions, while in the Lebanon all members must be in full possession of their civil rights. In some cases supervisors are not allowed to join the same union as ordinary workers. This is the position in China, while in Japan any union which admits a representative of an employer, including supervisors or persons in a confidential capacity, loses its recognition as a trade union. Some countries impose restrictions on political or racial grounds, as does the Union of South Africa under the Suppression of Communism Act, 1950, as amended in 1951, and the Industrial Conciliation Act, 1937, as amended by the Native Labour (Settlement of Disputes) Act, 1953. Sometimes the restrictions are occupational either being confined or, often in the case of agriculture, forbidden to members of a particular trade. Akin to this restriction is that which forbids union membership to public employees. In Chile and Peru this restriction is general in scope, but more usually it is limited, as with the British Police Act, 1919.[18]

Problems sometimes arise with regard to the freedom of choice enjoyed by employers and workers with regard to organising themselves. In the United Kingdom they enjoy complete freedom. More usually, however, registration or approval in some form or another is essential, and in Australia the Registrar is able under the Consolidated Commonwealth Conciliation and Arbitration Act, 1904–26, to refuse to register an organisation if there already exists a registered organisation to which the members of the association might conveniently belong.[19] There are also restrictions on the free functioning of organisations that already exist, sometimes authorising government representatives to be present at elections or to veto proposed articles in the union's constitution.[20] Most of the countries of Latin America completely forbid trade unions from taking part in political activity, while others impose restrictions on the use of trade union funds for political purposes, as is the case in the United Kingdom under the Trade Union Act, 1913. In New Zealand, on the other hand, under the Political Disabilities Removal Act, 1936, not only is membership of a trade union compulsory, but there is no right to contract out of the payment of a political levy.[1]

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[17] *ibid.*, p. 28.

[18] *ibid.*, pp. 91–100.

[19] *ibid.*, pp. 101–5.

[20] *ibid.*, pp. 105–16.

Although the International Labour Organisation has recognised the right of employers' and workers' organisations freely to maintain contact with international organisations operating in their field of activity, and has in fact described this right as 'the natural corollary of the right of affiliation,'[2] some members of the Organisation make such co-operation difficult. In Turkey the consent of the Council of Ministers is necessary, and in 1953 the Committee on Freedom of Association considered that this requirement might be 'incompatible with the principle of free and voluntary affiliation of trade unions with international organisations.'[3] Similarly, Portugal prohibits international affiliation, although the Government may allow it and has permitted the Association of Portuguese Industrialists to affiliate to the International Employers' Organisation. The sending by an employers' or workers' organisation of a representative to an international congress without prior permission is likewise forbidden in Portugal.[4]

The McNair Committee pointed out that it had 'not been asked to make recommendations for a solution of the controversy which brought [about its] appointment. [Its] task [was] to state the facts' as it found them.[5] It found that in at least twenty countries industrial organisations could be dissolved or have their registration cancelled without any previous application to a court, and it had no doubt that abuses had occurred. It was of opinion that the best safeguard of an organisation's rights in this respect was the requirement of a prior court order.[6] The Committee also pointed out that since the First World War, Governments had played an increasing role in economic activities and had increased their influence accordingly, and 'it would not be surprising if this movement had had a certain impact upon the work of the International Labour Organisation, namely in changing the relative importance of the three elements reflected in its tripartite structure. . . . It seems probable that there has been a shift of emphasis in the nature of the contribution to the work of the International Labour Organisation to be expected from the employers and workers. Originally, employers and workers were represented—and represented separately—very largely for the protection and defence of their respective material interests. . . . The original purpose of the separate representation . . . has . . . taken on a wider content and now represents also a combined interest of the two elements in the productivity of industry and in the function or skill of management in industry. Perhaps today . . . the contribution to be expected from the representatives of the employers and of the workers is more positive and less negative than it was at the beginning, . . . it is directed more to ensuring productivity and skilled management and less to the mere safeguarding of the interest of capital and labour.'[7]

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[1] *ibid.*, pp. 117–20.

[2] *ibid.*, p. 155.

[3] *ibid.*, p. 159, citing *Seventh Report of the I.L.O. to the United Nations*, 1953, Sixth Report of the Committee on Freedom of Association, para. 854.

[4] *McNair Report*, p. 160.

[5] *ibid.*, p. 197.

[6] *ibid.*, pp. 195–9.

In the light of this Report and of the width of discriminatory practices brought to light by it, and particularly of the avowed expression of intention by the United States' Employers' Delegate[8] to drive the Communist States out of the Organisation, it is as well to recall the comment of Dr. Jenks: 'The legal position appears to be clear. The Constitution does not require the fulfilment of any specified requirements in respect of freedom of association as a question of admission to membership [, even though] freedom of association is described by the Constitution as one of the objects for the promotion of which the Organisation exists.'[9] There appears to be little doubt, in fact, that for the purposes of the strict letter of the Constitution sufficient freedom exists for the organisations of workers and employers, or those within the managerial classes fulfilling the functions of employers, within countries possessing a socialist economy, for these countries to satisfy the requirements of the tripartite character of the Organisation.

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[7] *ibid.*, pp. 200–1.

[8] Text to n. 3, p. 77, above.

[9] *op. cit.* n. 1, p. 57, above, p. 92.

Perhaps the most telling comment, and that which most correctly describes the situation in the light of the purposes of the International Labour Organisation, is that made by the late Sir Harold Butler, the Director, in 1937 at the time of the first dispute concerning the Soviet delegation:

> 'The term "employer" . . . meant a person who employed servants, workmen, *etc.*, for wages. According to this definition there were workers in every country. . . . It was impossible to imagine an industry in any country, whatever the system of production permitted there, in which there were not employers and workers. The relation was still more clear in the German language, where the terms for "employer" and "worker" respectively were *Arbeitgeber* and *Arbeitnehmer*. He doubted whether whatever might be the social organisation of a country, the interests of the "work-giver" could be identical with those of the "work-taker." . . . In the Soviet Union there were collective agreements between the work-givers and the work-takers. It thus seemed extremely dangerous to go behind the word "employer" and try to limit it to certain kinds of employers. . . . There was the employer who worked for his own profit; . . . the employer who worked partly for the profit of himself and partly of shareholders; . . . the employer who worked for profit, but with a Government subsidy which limited his freedom and subjected him to some kind of control; . . . the employer who worked for the benefit of the public by managing a public utility service under conditions laid down by the law. . . . There was also the employer who worked for profit which went not to himself or to the shareholders, but to the State. . . . There were also employers who did not work for profit, for example, employers who employed domestic servants. In addition, there were Government undertakings of all kinds . . . which were not run for profit. Yet another class of employer was the co-operative society. . . . All these employers had one thing in common, which was that they gave work for money. This was the essential element in an employer. It was therefore as dangerous to make distinctions between different kinds of employers as it would be to make distinctions between workers according to their method of organ-

> isation or their political convictions. The right course was to hold strictly to the terms of the Constitution, which simply referred to employers and workpeople without making any further distinction. All those who provided employment for remuneration were employers.'[10]

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[10] Governing Body, 29th Session, 1937, pp. 39–40.

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# COMPENSATION FOR INDUSTRIAL INJURIES

### Douglas Payne

Industrial accidents take a heavy toll of life and limb in our modern society. Though the number of fatal accidents has fortunately declined in recent years, the number of non-fatal injuries has risen steadily, both absolutely and relatively, throughout the past half century. In 1955 there were 1,571 fatal accidents in industry, and 831,000 new claims for industrial injury benefit under the Industrial Injuries scheme. In this paper I propose to review the law governing the provision of monetary compensation for industrial injuries.

Under the existing law a person who suffers injury in the course of his employment will generally be entitled to claim certain benefits under the National Insurance (Industrial Injuries) Acts, 1946 to 1956. These benefits will in most cases compensate him only partially for the pecuniary loss resulting from the injury. He may, in addition, if his injuries are attributable to a breach of common law or statutory duty by some other person, recover damages on the ordinary common law scale for personal injuries. In such a case the common law damages will completely indemnify the plaintiff against all pecuniary loss he has suffered or is likely to suffer as the result of his injuries. Substantial sums may also be awarded in respect of pain and suffering, disfigurement and loss of expectation of life. One half of the value of any benefits under the National Insurance scheme which have accrued to the plaintiff or are likely to accrue to him within five years of the accident will be deducted from the common law damages.[1]

## THE BEVERIDGE REPORT

In his Report on Social Insurance and Allied Services,[2] on which the National Insurance scheme is founded, Lord Beveridge put forward three reasons for distinguishing in the matter of benefits between industrial and other injuries. These were, first, that 'many industries vital to the community are also specially dangerous, and it is essential that men should enter them and desirable therefore that they should be able to do so with the assurance of special provision against their risks . . . for themselves and their families'; secondly, that 'a man disabled during the course of his employment has been disabled while working under orders'; and thirdly, that 'only if special provision is made for the results of industrial accident and disease irrespective of negligence, would it appear possible—as on grounds of equity and for the avoidance of controversy it is desirable—to limit the employer's liability at common law to the results of actions for which he is responsible morally and in fact, not simply by virtue of some principle of legal liability.'[3]

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[1] Law Reform (Personal Injuries) Act, 1948, s. 2.

[2] Cmd. 6404 (1942).

He recommended therefore that disability resulting from an industrial accident or prescribed disease should, if it continued for more than thirteen weeks or resulted in death, qualify for a higher scale of benefits than under the general insurance scheme. In order to obviate the need in the great majority of cases to determine the cause of injury, he proposed that the ordinary sickness benefit should be paid during the first thirteen weeks of disability[4]; thereafter, if total disability continued, an industrial pension should be paid equivalent to two-thirds of full-time earnings, subject to a maximum of £3 a week. He recommended that the funds required for these benefits should be raised, as to about two-thirds, from contributions by employers, workers and the State in the same proportions as for the general insurance scheme, and, as to about one-third, from a special levy on employers in industries scheduled as liable to materially more than the normal risk for industry as a whole, the amount of the levy to depend on the degree of risk in the particular employment and the employer's pay-roll.

### THE NATIONAL GOVERNMENT'S WHITE PAPER ON SOCIAL INSURANCE

The war-time National Government, in its own White Paper on

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[3] *ibid.*, p. 39.

[4] The Report states that the period of incapacity lasted for more than thirteen weeks is less than 10 per cent. of all claims for workmen's compensation (p. 40).

Social Insurance,[5] endorsed the criticisms of the existing scheme of Workmen's Compensation in Lord Beveridge's Report, and accepted his proposal to make the payment of compensation for industrial injuries a social service linked with the general insurance scheme. It rejected, however, his proposal to relate industrial pensions to earnings before the accident, as well as his suggestion that the funds should be raised as to part by a levy on employers in dangerous industries. To relate pensions to earnings would, the Government thought, be to contravene the general principle of the proposed national insurance scheme that there should be differentiation in benefits only according to family responsibilities, and would also involve the practical difficulty of determining rates of earnings before and, in the case of partial incapacity, after the accident. The White Paper dwelt on the injustice of relating compensation to earnings where a workman is injured at a time when his earnings are relatively low, and also on the unfortunate tendency such a rule might have in discouraging an injured workman from returning to work as soon as he is fit to do so or from taking full advantage of any rehabilitation treatment available to him.

The Government decided therefore to abandon the principle of relating compensation to earnings, adopted by the Workmen's Compensation Acts, in favour of a flat rate of benefit taking account solely of family responsibilities. At the same time it proposed that benefit, usually in the form of a pension, should be paid, as under war pensions schemes, according to the assessed degree of disablement resulting from an injury irrespective of any loss of earning power. The White Paper recognised that the Government's own proposals would, for some higher paid workmen, result in the payment of less compensation than under the scheme proposed by Lord Beveridge. In the great majority of cases, however, the Government thought that its own scheme would be the more favourable.

The Government, as I have said, also rejected Lord Beveridge's proposal for a special levy. Indeed, it may be said that the Government's rejection of this proposal entailed almost inevitably its rejection of the proposal to relate compensation to earnings, since, as the White Paper itself says, it is difficult to reconcile any differentiation of benefit with uniform subscriptions from employers and workers. A special levy on dangerous industries would, the Government thought, be 'a departure from the principle of all "standing-in" with complete pooling of risks,'[6] which was generally adopted in other branches of social insurance. Hazardous industries, it was pointed out, are not hazardous because the employers in them are less careful than other employers. Moreover, such a levy would fall most heavily on certain important industries such as mining and shipping which have to meet foreign competition. One of the arguments put forward by Lord Beveridge in support of a special levy was that it would, if combined with a system of 'merit rating,' *i.e.,* fixing the employer's contribution according to the risk in particular industries or undertakings, provide him with a real incentive to prevent accidents. The Government however was sceptical of this view, pointing out that merit rating was generally adopted in insurance against workmen's compensation risks and that Departmental Committees[7] which had inquired into the operation of the Workmen's Compensation Acts had found no evidence that merit rating in insurance practice made any significant contribution to safety.

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[5] Part II, Workmen's Compensation, Cmd. 6551 (1944).

### THE INDUSTRIAL INJURIES SCHEME

The National Insurance (Industrial Injuries) Act, 1946, passed by the Labour Government after the war, was based on this White Paper. Under the Act, which came into force with the rest of the national insurance scheme on July 5, 1948, every person employed under a contract of service, whatever the amount of his earnings, who suffers personal injury caused by accident arising out of and in the course of his employment or by any prescribed disease due to his employment becomes entitled to one or more of the benefits provided by the Act. These benefits are of three kinds: industrial injury benefit, industrial disablement benefit and industrial death benefit. Both employers and persons insured contribute, at present at the rate of 6d. and 5d. a week respectively,[8] to an Industrial Injuries Fund, the Exchequer contributing each year one-fifth of the amount contributed by both employers and insured persons.

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[6] *ibid.,* p. 17.

[7] Cd. 2208 (1904); Cmd. 816 (1920).

[8] The rates of contribution are lower for women and for boys and girls under eighteen.

Whereas under the Workmen's Compensation Acts claims were made against the employer and any dispute generally referred to the county court, claims for benefit under the National Insurance (Industrial Injuries) Acts are made in the first instance to an insurance officer, who must either give a decision himself or refer the claim to a local appeal tribunal. If he decides the case himself, an appeal lies from his decision to a local appeal tribunal, and from the decision of that tribunal, at the instance of either the claimant or the insurance officer, to the Industrial Injuries Commissioner, whose decision is final. The administration of the scheme has thus been taken completely out of the hands of the ordinary courts.[9]

### BENEFITS UNDER THE SCHEME

An insured person who is incapable of work as the result of an accident or prescribed disease may claim industrial injury benefit. The present weekly rate is 67s. 6d. for an adult, with an increase of 25s. for a wife, 11s. 6d. for a first child, and 3s. 6d. for each further child.[10] Industrial injury benefit is payable for a maximum period of six months.

If the accident or disease results in 'loss of physical or mental faculty' assessed at not less than 1 per cent. an insured person is entitled to claim disablement benefit.[11] This is the long-term benefit for disablement due to an industrial accident or disease. It normally follows a period of injury benefit, and is not payable until the insured person's right to injury benefit has been exhausted, *i.e.*, until he ceases to be incapable of work or the six months period has elapsed. The amount of disability benefit payable depends upon an assessment by a medical board of the degree of disability. 'Loss of physical or mental faculty' is interpreted to mean some impairment of the power to enjoy a normal life. It takes account of disfigurement and in no way depends on loss of earning power. If the disablement is assessed at less than 20 per cent., the benefit takes the form of a lump sum payment not exceeding £225 known as a 'disablement gratuity.' Otherwise it takes the form of a disablement pension depending on the degree of disability.[12] The pension for 100 per cent. disability is at the present time 67s. 6d. a week, *i.e.,* the same as industrial injury benefit. A disability pension may be increased by an 'unemployability supplement' of 40s. a week if the pensioner is incapable of work and likely to remain so permanently, or by a 'special hardship allowance' of up to 27s. 6d. a week if the pensioner is unable as the result of his injuries to follow his regular occupation or one of an equivalent standard. The disability pension and special hardship allowance cannot together exceed 67s. 6d. a week.[13] If the disability is assessed at 100 per cent. and the pensioner is in need of constant attendance, the pension may also be increased by an amount up to 30s. a week.[14] Allowances for dependants, on the same scale as for industrial injury benefit, are payable if the pensioner is entitled to an unemployability supplement.[15]

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[9] Certain questions (known as Special Questions) are reserved for the Minister, from whose decision there is an appeal on a point of law to the High Court. These Special Questions include such matters as whether a person is in insurable employment, liability for contributions, and the rate of contribution payable in particular cases. Disablement questions, *e.g.*, whether loss of faculty has resulted or is likely to be permanent and the degree of disablement, are determined by a medical board with an appeal to a medical appeal tribunal: National Insurance (Industrial Injuries) Act, 1946, ss. 36–41.

[10] Rates of benefit were last increased as from May 1955 by the National Insurance Act, 1954.

[11] National Insurance (Industrial Injuries) Act, 1946, s. 12, as amended by the National Insurance (Industrial Injuries) Act, 1953, s. 3.

If the accident is fatal, a widow becomes entitled to an allowance of 55s. a week for the first thirteen weeks of widowhood. Thereafter, she becomes entitled, for life or until she remarries, to a pension which varies according to her circumstances. If she is entitled to an allowance in respect of a child, or is over fifty when her husband dies or over forty when she ceases to be entitled to an allowance in respect of a child, the rate of pension is 45s. a week, supplemented by the ordinary allowances for children. Otherwise it is 20s. a week.[16] Upon remarriage she becomes entitled to a gratuity equal to fifty-two times the weekly pension she is then entitled to.

[12] The assessment is 100 per cent. for: (a) Loss of both hands or of both feet above the ankle; (b) Loss of a hand and a foot; (c) Loss of sight; (d) Absolute deafness; (e) Very severe facial disfigurement.

[13] Subject to these maxima, the amount of the special hardship allowance will be the difference between pre-accident earnings and the standard of remuneration of any insurable employment which is suitable for the pensioner and which he is capable of following.

[14] In cases of exceptionally severe disablement the maximum is 60s. a week.

[15] A disability pension is raised to 100 per cent. for any period during which a pensioner is receiving approved hospital treatment. During such a period dependants' allowances are also payable.

[16] This 20s. rate has not been raised since the original Act in 1946. Other rates of benefit have risen by about two-thirds.

The rates of benefit payable under the Act are considerably higher than those payable under the general insurance scheme, where the standard rate of benefit for unemployment, sickness and retirement benefit is at present 40s. a week.[17]

### A COMPARISON WITH WORKMEN'S COMPENSATION

It will, I think, be generally conceded that payment of disablement benefit irrespective of loss of earning power is an improvement upon the principle of the Workmen's Compensation Acts which confined compensation to loss of earning power. It gives some expression to the principle underlying a common law award of general damages for pain and suffering and disfigurement.

It is, however, remarkable in a country with a trade union movement as strong as our own that the rates of benefit for incapacity should be so low in relation to average earnings. It is interesting to compare the position of a workman in 1938 under the system of workmen's compensation then in force with his position at the present time.

In 1938 the amount of compensation payable for total incapacity was, where the workman's average earnings exceeded 50s. a week, one half of his earnings up to a maximum of 30s. a week.[18] The rate of compensation was the same whether or not the workman had dependants. Average weekly earnings in 1938 in all industries were 53s. 3d. for all workers and 69s. for men twenty-one and over.[19] For a workman over twenty-one in receipt of average earnings the amount of compensation for total incapacity would therefore have been a little less than half his wages.

Under the existing industrial injuries scheme an insured person with a wife and two children who is incapable of work as the result of an accident or prescribed disease will, for the first six months of incapacity, be entitled to a total benefit of 106s. 6d. a week.[20] At the present time average earnings for all workers in industry are just over £10 a week and for men aged twenty-one and over just over £12 a week.[1] The amount of benefit for a man twenty-one or over with a wife and two children, in receipt of average earnings, will therefore be, as in 1938, a little under half his earnings. The position of a single man without dependants has however clearly worsened under the existing scheme. The amount of benefit payable, if he is over twenty-one and in receipt of average earnings, will be less than 30 per cent. of his previous wages.

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[17] Allowances for dependants are the same under both the National Insurance and Industrial Injuries schemes.

[18] Workmen's Compensation Act, 1925, s. 9 (2) (i).

[19] 93 *Annual Abstract of Statistics* (1956—H.M.S.O.), Table 142.

[20] If, at the end of six months, an insured person is still unfit for work and likely to remain so, and his disability is assessed at 100 per cent., this total may be increased by a 40s. unemployability supplement. But it is rare for incapacity to last for so long: see above, n. 4, p. 86.

The principle on which compensation was paid under the Workmen's Compensation Acts in cases of fatal accidents is so different from the provisions of the existing scheme that it is a little difficult to make any comparison in terms of generosity. Under the Workmen's Compensation Acts, in fatal cases, the compensation took the form of a lump sum the amount of which depended on (a) the workman's earnings, and (b) the number of those dependent on him and the degree of their dependency. In 1938, if a workman left any person wholly dependent on his earnings, the compensation payable was £200 or three years' earnings, whichever was the greater, up to a maximum of £300. Where the dependants included, in addition to a totally dependent adult, children under the age of fifteen, this sum was supplemented by an allowance varying according to the age of each child, subject to an absolute maximum of £600.[2]

Under the existing scheme, as mentioned above, death benefit for a widow takes the form, not of a lump-sum payment, but of a weekly pension, varying in amount according to circumstances, for life or until remarriage. There can be little doubt that in many cases the existing system is more generous than the system which prevailed in 1938, though there is, I think, a good deal to be said for the compromise suggested by Lord Beveridge, *i.e.*, ordinary widow's benefit as under the general insurance scheme together with a lump-sum payment. A lump sum in addition to a pension would soften the transition to a lower standard of living, and for a young widow without children a lump sum alone would seem to be a more appropriate form of compensation than a pension for life or until remarriage.

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[1] In October 1955 average earnings were 187s. 2d. and 222s. 11d. respectively: 93 *Annual Abstract of Statistics* (1956—H.M.S.O.), Table 142. Since then earnings have risen by about 10 per cent.

[2] Workmen's Compensation Act, 1925, s. 8.

### CRITICISMS OF THE EXISTING SCHEME

This comparison shows that while in some respects the existing scheme is more generous than the system of workmen's compensation in operation before the war, in other respects it is considerably less so. It needs to be borne in mind, however, that the scale of compensation allowed by the Workmen's Compensation Acts in 1938 had long been criticised for its excessive meanness, and that in this respect it compared unfavourably with systems of workmen's compensation in other industrial countries. As long ago as 1920 a Departmental Committee[3] appointed to inquire into the working of the system of workmen's compensation then in force recommended that the proportion of a workman's weekly wage payable during total incapacity should be increased from one-half to two-thirds and that the maximum sum payable should be increased from £1, the limit at that time, to £3. But this proposal was not accepted, and the Workmen's Compensation Act, 1923, merely raised the maximum weekly compensation from £1 to 30s. without altering the proportion of one half, except in relation to poorly paid workmen.[4]

As we have seen, Lord Beveridge, too, recommended that, after the first thirteen weeks of incapacity for work, an industrial pension should be paid equal to two-thirds of full-time earnings up to a maximum of £3 a week.[5] That this proposal was not unduly generous, at least in comparison with other countries, is shown by a Memorandum of Evidence on workmen's compensation in other countries submitted to the Royal Commission on Workmen's Compensation in 1939 by the International Labour Office,[6] and from figures supplied to Lord Beveridge for the purposes of his inquiry by the same organisation.[7] These show that in ten countries selected as most significant for purposes of comparison with ourselves[8] the general practice is to place the cost of compensation for industrial injuries solely on the employer and so, through him, upon the particular industry in which the workman is engaged. The rate of compensation for incapacity, either total or partial, excluding dependants' allowances, is generally two-thirds of the wage loss. All countries prescribe a maximum basic wage in reference to which compensation is assessed, but this is usually higher than the average wage of a skilled workman. In October, 1938, for example, the average wage of a skilled fitter or turner in most European countries and Canada was about three-quarters of the maximum basic wage for compensation purposes.[9] As was the case under our own Workmen's Compensation Acts, the amount of compensation is usually the same whether or not a workman has others dependent on him.

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[3] Generally known as the Holman Gregory Committee: Cmd. 816 (1920).

[4] Where the average weekly earnings were less than 50s. but more than 25s., the amount payable for total incapacity was a quarter of those earnings plus 12s. 6d., and where less than 25s., three quarters of those earnings: Workmen's Compensation Act, 1923, s. 4 (2).

[5] At the time of his Report (1942) the cost of living had risen by very little since 1938.

[6] *Royal Commission on Workmen's Compensation, 1939: Minutes of Evidence*, pp. 585 *et seq.*

[7] Cmd. 6404 (1942), pp. 47, 287–93.

[8] The ten countries were: Australia, Belgium, Canada, Denmark, Germany, New Zealand, Roumania, South Africa, Sweden, U.S.A.

We have, I believe, no reason to be satisfied with the present state of English law governing compensation for industrial injuries. There were many defects in the old system of workmen's compensation: the costly and contentious procedure for settling disputes; the difficulty of prosecuting a claim without the assistance of a trade union; the lack of any complete security for the payment of compensation, there being no obligation on the employer to insure against liability; the possibility of improper pressure being brought to bear on an injured workman by an employer or by the latter's insurer to reduce a claim; the possibility of lump-sum settlements instead of weekly payments; and the relatively high costs of many of the insurance offices indemnifying employers against liability. In view of these many disadvantages, it was perhaps inevitable that the provision of compensation for industrial injuries should become a social service linked with the general scheme of insurance proposed by Lord Beveridge and introduced by the Labour Government after the war. But all these disadvantages could have been overcome without discarding the principle which imposed the whole cost of compensation on the employer and so, through insurance cover, on the industry in which the workman is engaged.

None of the arguments put forward against continuing this principle have much weight. Certain industries, such as mining, shipping and building, are, it is true, inevitably dangerous. But if it be thought just that compensation should be paid for industrial injuries irrespective of the employer's fault, then it is difficult to see why the burden of paying compensation for occupational injuries should not be regarded as an ordinary operating cost of the industry in question. It is beside the point to contend, as the National Government did in its White Paper on Social Insurance, that hazardous industries are not hazardous because the employers in them are less careful than other employers.[10] One might with as much force argue that the cost of wear and tear on plant and machinery, which varies greatly from one industry to another, should, on grounds of justice, be pooled between all. It is not surprising that one of the most fervent advocates of a complete pooling of the cost of workmen's compensation was the National Union of Mineworkers, who pointed out that under the Workmen's Compensation Acts the burden of compensation entered into the cost of getting coal and so, it was alleged, depressed the wages of miners.[11] Both Lord Beveridge in his Report and the Government in its White Paper failed, I think, to recognise the real distinction between occupational and non-occupational risks.

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[9] *Royal Commission on Workmen's Compensation, 1939: Minutes of Evidence*, p. 592.

Nor is there much force in the argument that, if the whole cost is borne by employers, it would be difficult to justify taking the administration of workmen's compensation out of their hands, with all its attendant evils. In reality, the old system of workmen's compensation was administered, not by the employers themselves, but by the insurance offices which insured them against liability, and most of the evils of the system followed from the fact that the insurer had an interest, in the event of an accident, in reducing or denying the employer's liability. To avoid the evils of the old scheme it would have been sufficient to provide that every employer should insure against liability with the State, which would not have the same interest as a private insurer in challenging a claim, or should contribute to a central State insurance fund at a rate appropriate to the occupational hazards of his workmen.[12] Claims could then be made, as under the present system, to a special tribunal, combining informality with cheapness.

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[10] Cmd. 6551 (1944), p. 17.

[11] *Beveridge Report*, Cmd. 6404 (1942), p. 41.

[12] This is what has happened in France. By a law of October 30, 1946, compensation for industrial accidents became part of the social security system, and the individual responsibility of employers was extinguished. An injured workman claims compensation from an insurance fund to which the employer contributes at a rate varying with the risks of the employment. For details, see A. Rouast and P. Durand, *Précis de Législation Industrielle* (4th ed., Paris, 1951), pp. 499–562.

Another argument advanced by Lord Beveridge against placing the whole cost of compensation on employers was that 'it is undesirable that while most forms of interruption of earnings are met by benefit to which the insured persons, with others, have contributed and out of a fund in whose stability and economical administration they are directly interested there should be one form of interruption for which funds are provided wholly by someone else.'[13] It would result, he thought, in constant pressure to raise the level of compensation for industrial injuries, though the need in such cases was no greater than where earnings are interrupted for some other reason, such as sickness or unemployment. Here again, I think, the argument ignores the real distinction between occupational and non-occupational risks. A man killed or seriously injured in the course of working in a dangerous but essential industry is killed or injured in the service of his country. The risk of injury in some industries must be greater than the risk in some branches of the armed services in time of war. The needs of a man injured in the course of his work may, as Lord Beveridge said, be no greater than a man who suffers some other misfortune. But this does not entail, to the ordinary moral sense at least, that there is an equal right to compensation in every case, as the history of war pensions and workmen's compensation shows.

Finally, we need not attach much importance to the plea that the burden of imposing the cost of compensation wholly on employers would fall most heavily on certain important industries which have to meet foreign competition, since it is in fact the general practice of other countries to place this burden on industry.

As was said earlier, the decision to pool the risks of industrial accidents between all industries and to raise the necessary funds for compensation solely from flat-rate contributions by employers and workmen and the Exchequer entailed inevitably that the principle of relating compensation to earnings should be abandoned in favour of flat rates of benefit. It was, I think, a mistake to abandon this principle. If, as I have suggested, a workman killed or seriously injured in the course of his work is

[13] *op. cit.*, p. 95, above, n. 11, p. 45.

to be compared with a member of the armed services killed or injured in time of war, then it is difficult to see why the compensation payable should not bear some relation to previous earnings, just as the amount of a war pension varies with the rank of the person disabled.[14] An upper limit would have to be set, as it is in all countries, to keep the compensation within bounds, but this limit should not be too low. Quite apart from the argument that it is only just that the compensation payable to a workman in the event of injury should bear some relation to the value of his services, as evidenced by his earnings, it needs to be remembered that a highly paid workman may be committed to large weekly payments in respect of rent, mortgage interest or hire purchase. To suffer a reduction of earnings from £15 or more a week to the current rates of benefit may in such a case cause great hardship.

To relate compensation to earnings would of course involve greater administrative expense than the present scheme. But cheapness may be bought at too high a cost. To avoid the difficulty and administrative expense of determining the actual pre-accident earnings and the unsatisfactory results it sometimes led to, compensation could, at least in the great majority of cases, be related to standard or average earnings in the claimants' trade or branch of employment.

### EMPLOYERS' LIABILITY AT COMMON LAW

In what I have said so far I have ignored the possibility that a workman injured in the course of his employment may be able to recover common law damages from some person responsible in law for his injuries. Common law damages always indemnify a plaintiff against all his pecuniary loss resulting from an injury, and it may be thought by some that any deficiencies of our present industrial injuries scheme are offset by the possibility of recovering such damages. The chance of recovering common law damages for industrial injuries has been increased by several changes in the law over recent years. By the Law Reform (Miscellaneous Provisions) Act, 1934, the effect of the death of either party is no longer to extinguish a cause of action for personal injuries; by the Law Reform (Contributory Negligence) Act, 1945, contributory negligence by an injured workman is no longer an absolute bar to an action for damages, but merely a ground for reducing damages; by the Law Reform (Personal Injuries) Act, 1948, the defence of common employment is no longer available to an employer; and by the Legal Aid and Advice Act, 1949, legal aid is made available to assist a workman to prosecute a claim. Further, the scope of the action for breach of statutory duty, in which an employer is often liable without fault, has been widened by the extension of statutory regulation and protection to wholly new industries,[15] while the employer's duty to his workmen at common law has recently been interpreted to require a degree of care which may fairly be described as paternal.[16] In the result, actions by workmen against their employers have become the commonest form of tort action, and it is rare to find an issue of the Weekly or All England Reports that does not contain one or more cases on this branch of the law.

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[14] The standard rate of war pension for other ranks is at present 67s. 6d. a week for 100 per cent. disablement, *i.e.*, the same as industrial injury benefit. For a Major-General (or equivalent) it is £480 a year.

I doubt, however, whether this expansion of the common law action for damages can properly be considered as offsetting the inadequacies of the industrial injuries scheme, or, indeed, whether the growth of this action is truly in the interests of workmen as a class. Actions at common law by workmen against their employers are attended with most of the disadvantages of the old system of workmen's compensation, the chief of which were enumerated earlier. The opposition of interest between employer and workman is exaggerated by the mode of trial, thus tending to poison industrial relations, and great sums are paid out in legal costs. More often than not nowadays the employer himself is not personally at fault, and it must often seem to an injured workman a mere lottery whether or not his employer is liable to him in damages. As the law at present stands, a workman guilty of the most foolhardy disregard of his own safety may nevertheless recover substantial damages from his employer, though the latter is in no way personally at fault,[17] while another workman, whose conduct is blameless, may be entitled to nothing more than industrial injury benefit.

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[15] *e.g.*, Agriculture (Safety, Health and Welfare Provisions) Act, 1956.

[16] *e.g.*, *Clifford* v. *Challen & Son Ltd.* [1951] K.B. 495; *General Cleaning Contractors Ltd.* v. *Christmas* [1953] A.C. 180; *Drummond* v. *British Building Cleaners* [1954] 3 All E.R. 507.

[17] *e.g.*, *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663; *Williams* v. *Sykes and Harrison Ltd.* [1955] 3 All E.R. 225.

### THE LAW REFORM (PERSONAL INJURIES) ACT, 1948

One of the most misguided pieces of legislation for many years must surely be the Law Reform (Personal Injuries) Act, 1948, which abolished the doctrine of common employment. In his Report on Social Insurance, Lord Beveridge, as I mentioned earlier, gave as one of three reasons for making special provision for industrial accidents that only if this were done would it be possible—as on grounds of justice and to avoid controversy he thought it desirable—to limit the employer's liability at common law to cases where he is morally at fault. He recommended that the question of alternative remedies should be considered by a special committee with the qualifications and time to go into all the issues involved. Accordingly, a Departmental Committee under the chairmanship of Sir Walter Monckton was appointed in 1944 to consider, having regard to the observations of Lord Beveridge in his Report, how far actions for personal injuries should affect, or be affected by, the proposed social insurance legislation, and whether any alteration was desirable in the law governing the liability of employers and others for industrial accidents.

With some of the recommendations of the Monckton Committee[18] I am not here concerned. The Committee dealt with actions for industrial injuries separately from other actions for persons' injuries. Notwithstanding Lord Beveridge's observations, it came down against abolishing common law claims, not only in non-employment cases where the disparity between insurance benefits and common law damages would often be very great, but also in the case of industrial injuries. The National Government, in its own White Paper on Social Insurance, had, as we have seen, rejected Lord Beveridge's proposal to relate benefit for industrial injuries to earnings in favour of benefit at a flat rate, and the Committee pointed out that under these new proposals the benefit payable would often fall far short of common law damages. The Government's proposals had also weakened the case for abolishing the workman's common law claim in rejecting Lord Beveridge's proposal for a special levy on dangerous industries. The Committee also rejected the proposal to limit the common law liability of an employer to cases where the injury is caused by serious and wilful misconduct or gross negligence either of the employer himself or of some person acting in superintendence, though it did recommend that it should be a defence to an action for breach of statutory duty brought by an injured workman for an employer to prove that it was not reasonably practicable for him or his servants to avoid the breach. Finally, and somewhat surprisingly in view of its terms of reference, the Committee recommended that the doctrine of common employment should be abolished.

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[18] *Final Report of the Departmental Committee on Alternative Remedies,* Cmd. 6860 (1946).

The effect of the Committee's proposals was thus to enlarge the scope of the common law action rather than, as Lord Beveridge hoped, to restrict it. It is clear that the Committee, composed largely of lawyers, viewed litigation in respect of industrial injuries with considerably less dismay than Lord Beveridge. In view of the flat-rate benefits proposed by the Government, it was perhaps inevitable that the idea of abolishing the common law action should have been rejected. But it is, I think, a matter both of astonishment and regret that the Committee should have so lightly proposed a great extension of its scope.

Much of the criticism directed at the doctrine of common employment was superficial. The customary explanation that a workman in his contract of service impliedly accepted the risk of negligence by fellow servants may have been 'a sheer fiction',[19] but this does not entail that the rule was not founded on good public policy. Fictions have often in English law served beneficial purposes. Again, comparison of the lot of a workman injured by the negligence of a fellow servant with that of a stranger loses much of its force in view of the special privileges which workmen enjoyed under workmen's compensation. The imposition of liability without fault, of which vicarious liability is one species, requires to be justified by special considerations of public policy. So long as a workman enjoyed the special privilege of being entitled to workmen's compensation for industrial injuries irrespective of any fault on the part of his employers, there was sound justification for the doctrine of common employment. Indeed, as à matter of historical fact it is I think true to say that the introduction of workmen's compensation in England in 1897 was regarded as a *quid pro quo* for the retention of the common employment doctrine.[20] The practice of other countries upon introducing workmen's compensation has almost without exception been to make a claim for compensation the exclusive remedy for industrial injuries except in the case of gross personal negligence on the part of the employer.[1]

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[19] *Per* Lord MacMillan in *Radcliffe* v. *Ribble Motor Services Ltd.* [1939] A.C. 215 at 235.

The Law Reform (Personal Injuries) Act, 1948, gave effect to the Monckton Committee's proposal to abolish the doctrine of common employment. The Labour Government rejected however the Committee's proposal that it should be a defence to an action for breach of statutory duty that it was not reasonably practicable to avoid the breach.[2] The Act also departed from the recommendations of both Lord Beveridge and the Monckton Committee in another important respect in providing that only half the amount of any benefits under the industrial injuries scheme received or likely to be received within five years of the accident should be taken into account in assessing common law damages. Both Lord Beveridge and the Monckton Committee had recommended that, following the principle of earlier National Health Insurance Acts, common law damages should be abated by the whole of any benefits received or likely to be received in the future. They pointed out that the overriding principle of common law damages is to make good the injured person's loss; so that if part of that loss is made good by national insurance benefits the defendant's liability to pay damages should be reduced *pro tanto*.

The Labour Government defended its departure from these proposals on the ground that workmen would be contributing, as to five-twelfths, to the national insurance funds and therefore should be entitled to recover common law damages abated by only a proportion of those benefits, in accordance with the established common law rule which disregards, in assessing damages for personal injuries, any benefit accruing to a person under a private policy of insurance. The fallacy in this reasoning is of course that the contribution paid by each workman, even if we ignore the fact that it is compulsory and therefore hardly distinguishable from taxation, is not adjusted to the risks of his particular employment. A miner, exposed to the many serious risks of working underground, pays the same contribution as a university lecturer, who is exposed to few hazards. The majority of industrial accidents are suffered in a few dangerous industries. In reality, therefore, workers in dangerous industries are insured against accidents largely by employers and workmen in safer occupations.

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[20] See A. Wilson and H. Levy, *Workmen's Compensation*, Vol. 1 (Oxford, 1939), Chaps. II and III.

[1] See Riesenfeld, 'Contemporary Trends in Compensation for Industrial Accidents Here and Abroad' (1954) 42 *Cal. L.R.*, p. 531, at pp. 559–60.

[2] A clause providing for such a defence was dropped on the second reading: *Parl. Debates, Official Report,* House of Commons, 1948, Vol. 449, cols. 2162–6.

As was foreseen, this provision alone has led to a great increase in litigation. Even in a case where the workman injured has been guilty of the most culpable negligence, warranting a reduction of his damages by as much as 90 per cent.,[3] it will still be worth his while to sue or threaten to sue his employer, since any reduction of his damages in respect of insurance benefits is made before any reduction for contributory negligence.[4] In consequence, the amount recovered in damages is often quite disproportionate to the large sums which are expended in legal costs.

## CONCLUSIONS

I have tried to show in this paper that the present state of the law governing the payment of compensation for industrial injuries is in many respects unsatisfactory. Some features of the old system of workmen's compensation were worth preserving. It was, I believe, a mistake to abandon the principle of relating compensation to earnings and the principle of placing the cost of compensation directly or indirectly on a workman's employer. These two principles could have been preserved through the medium of a State insurance fund, while at the same time assigning the administration of compensation to special tribunals, as under the present scheme. It has also, I think, been a mistake to preserve, and even more to extend, the common law action as a remedy for industrial injuries. The more extensive the common law action, with its generous scale of compensation, becomes, the more anomalous becomes the lot of the injured workman who, through no fault of his own, is confined to the meagre benefits of the existing industrial injuries scheme. If the common law liability of employers were confined, as in other systems, to cases of serious personal fault, and the sums at present paid out in the form of insurance premiums on employers' liability policies were made available to augment the industrial injuries fund, it would be possible to pay compensation on a far more generous scale. To limit the employer's liability in such a way need not entail any falling off in the standard of care observed by them. Observance of statutory duties is best secured by a vigilant factory inspectorate enforcing the criminal law. Employers invariably insure against civil liability; they cannot insure against a heavy fine.

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[3] The plaintiff's damages were reduced by 90 per cent. in *Hodkinson* v. *Henry Wallwork* [1955] 3 All E.R. 236.

[4] Law Reform (Personal Injuries) Act, 1948, s. 2 (3).

## 6

# THE UNREASONABLENESS OF THE REASONABLE MAN

### Raphael Powell

In the course of his welcome to delegates to the first Commonwealth and Empire Law Conference held in July, 1955, the Lord Chancellor said: 'Here in Westminster Hall our forebears developed the fundamental concept of rationalism in the application of legal forms and principles. . . . What a debt do we owe to this concept, and what a burden too have we lawyers laid upon the shoulders of that ever resilient figure the reasonable man, whether he be sitting on a Clapham omnibus or at the controls of some jet-propelled rider of the skies. Long may he reign, to the comfort of my brother judges throughout the Commonwealth.'[1] And indeed the reasonable man has become an almost universal yardstick for the measurement of human conduct in a court. But a yardstick is at least a precise instrument of measurement. The reasonable man is like a rubber doll.

## THE HISTORICAL BACKGROUND

Of course the idea of reason is fairly old, even in the literature of English law. There is much of the law of reason in *The Doctor and Student* in the sixteenth century. Coke and Hale both speak of it in the seventeenth century. But at this time the application of reasonableness as a standard of conduct was still quite rare. With very few exceptions,[2] most of the cases on the defendant's plea to a claim for malicious prosecution refer only to *probable* cause down to the end of the eighteenth century.[3] The Justices Protection Act, 1803, s. 1 referred to *reasonable and* probable cause, and it may be from that date that there is a more frequent use of the idea of reasonableness in defences to claims for malicious prosecution. Even then the tendency to refer only to probable cause died hard.[4] The decisions on actions for negligence were equally reluctant to adopt the criterion of reasonableness. Cases down to the early nineteenth century refer more often to the prudent man.[5] In *Jones* v. *Boyce* Lord Ellenborough, C.J., asked the jury to consider whether the plaintiff's act was such as a reasonable and prudent mind would adopt.[6] But it was not until 1856 in *Blyth* v. *Birmingham Waterworks Co.* that the modern principle was clearly laid down by Baron Alderson.[7] Meanwhile, in 1711, *Mitchel* v. *Reynolds*[8] paved the way for the acceptance of reasonableness as a test of the validity of an agreement in restraint of trade. But again the principle was not fully adopted before the nineteenth century.[9] In contracts for sale of goods the rule that the courts will presume that the parties intend a reasonable price where no price is fixed appears to have been laid down by Tindal, C.J., in 1834 in *Acebal* v. *Levy*.[10] The application of reasonableness as a test of the amount of damages normally claimable for breach of contract was not clearly settled until *Hadley* v. *Baxendale* in 1854.[11] In the field of criminal law, the rule that reasonable provocation would enable a person charged with murder to be convicted only of manslaughter is a product of the last hundred years.[12] Even the phrase 'beyond reasonable doubt,' which until recently was regarded as an essential part of the summing-up to the jury in criminal cases, was probably not in common use until the beginning of the nineteenth century.[13]

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[1] *The Times*, July 21, 1955.

[2] *e.g.*, *Newton* v. *Creswick* (1688) 3 Mod.Rep. 165; *Jones* v. *Ginn* (1713) Gilb. 185.

[3] *e.g.*, *Golding* v. *Crowle* (1751) Sayer 1; *Farmer* v. *Darling* (1766) 4 Burr. 1971; *Smith* v. *Macdonald* (1799) 3 Esp. 7, N.P.

However, there is an interesting prelude to the modern rules in a quasi-legal pamphlet. It is *The Tryal of the Witnesses of*

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[4] Even in *Willans* v. *Taylor* (1829) 6 Bing. 183, affd. in error *sub. nom. Taylor* v. *Willans* (1831) 2 B. & Ad. 845, most of the judges used 'probable.'

[5] *e.g.*, *Cooper* v. *Barton* (1810) 3 Camp. 5n.; *Dean* v. *Keate* (1811) 3 Camp. 4.

[6] (1816) 1 Stark. 493 at 495.

[7] (1856) 11 Exch. 781 at 784.

[8] (1711) 1 P.Wms. 181.

[9] Two further cases in the eighteenth century are *Chesman* v. *Nainby* (1727) 2 Strange 739; *Davis* v. *Mason* (1793) 5 Term Rep. 118.

[10] (1834) 10 Bing. 376.

[11] (1854) 9 Exch. 341.

[12] Royal Commission on Capital Punishment (1949–53), Cmd. 8932, para. 137; Glanville Williams, 'Provocation and the Reasonable Man' [1954] *Crim. L.R.*, p. 740.

[13] See the notes to *R.* v. *Exall* (1866) 4 F. & F. 922 and *R.* v. *White* (1865) 4 F. & F. 383. Although in the latter the note refers to 'the old safe well-established rule,' I have found no clear statement of it before *R.* v. *Burdett* (1820) 4 B. & Ald. 95, *per* Abbott, C.J., at p. 162.

*the Resurrection of Jesus,* written by Thomas Sherlock in 1729. Sherlock at this time was Bishop of Bangor, but for nearly fifty years he had been the Master of the Temple. Sir Leslie Stephen wrote of him that in the House of Lords he held his own against luminaries of the rival profession.[14] The pamphlet affects to be the report of a mock trial which takes place at one of the Inns of Court. The Apostles were charged with giving false evidence in the case of the resurrection of Jesus. Some lawyers agreed to appoint a judge and counsel and empanel a jury. In one place counsel for the Apostles uses these words: 'Suppose you were told that your Friend sickned (*sic*) on Friday, was let blood on Saturday, and the third Day he died; what Day wou'd you think he died on? If you have any Doubt about it, put the Question to the first plain Man you meet, and he will resolve it.'[15] A few pages later he says[16]: 'Let any Man of common sense answer.' So too counsel on the other side says that 'in common Affairs . . . a reasonable Degree of Evidence ought to determine every Man.'[17] He is later charged by counsel for the Apostles with seeming to argue that 'a Resurrection is a thing in Nature impossible, at least impossible to be proved to the satisfaction of a rational Enquirer.'[18] All this looks very much like the language of a century later. Sherlock was probably well acquainted with the legal jargon of his day and one wonders why the terms he uses do not appear more frequently in the reports of cases decided in the eighteenth century. The reason may be that down to late in that century philosophical speculation was still hovering in the clouds of natural law. The standards for human conduct set by the courts were correspondingly high. At the end of the century Bentham brought lawyers back to earth again. By the end of the century the American and the French Revolutions had taken place and the Industrial Revolution was well under way. The age of the common man had begun. The judges adapted themselves to the new situation and used the common man as their standard; but, no doubt mindful of their earlier training in philosophy and their youthful flirtations with reason, they preferred to call him the 'reasonable' man.

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[14] Sir Leslie Stephen, *English Thought in the Eighteenth Century* (1876), I, p. 243.

[15] Thomas Sherlock, *The Tryal of the Witnesses of the Resurrection of Jesus* (1729), p. 48.

[16] *ibid.*, p. 51.

[17] *ibid.*, p. 58.

[18] *ibid.*, p. 59.

That is where the trouble began. For the word 'reasonable' has a number of different meanings and it has become more and more apparent that in different legal contexts its significance is not always the same; and the danger is that its use in one context may be improperly borrowed to fit another context. Professor Gluckman speaks of the 'reasonable liar'[19] and the 'reasonable wrongdoer.'[20] Sir Alan Herbert made an English court hold that the 'reasonable woman' does not exist in English law.[1] As my contribution to ambiguity I offer the 'reasonable lunatic' and the 'reasonable prostitute.' With some aid from *The Oxford Dictionary,* a few quotations and a brief view of some of the judgments, I shall consider some of the principal definitions.

### THE REASONING MAN

1. *Endowed with reason, rational* (*in the sense of having the faculty of reasoning*). From this meaning it is an easy transition to suppose that the reasonable man always does reason and that his reasoning is relevant to the question at issue. If there is time to reason, then of course reasoning may well be demanded provided that it is relevant. In *General Cleaning Contractors, Ltd.* v. *Christmas,*[2] the court had to decide whether the defendants had taken proper steps to protect window cleaners employed by them from dangers incidental to their work. Lord Oaksey said that the employer's duty is to give such general safety instructions as would be given by a reasonably careful employer 'who has considered the problem.'[3] But in many circumstances there is no time or opportunity for reasoning. For example, in *Anthony* v. *Braine*[4] two racing motorists collided on a race course, and one sued the other for damages. The defendant had failed to see the last lap signal and so did not realise that the race was over. He kept up a racing speed and ran into the plaintiff's car. McNair, J., said: 'The fact that

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[19] Max Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (1955), p. 359.

[20] *ibid.,* p. 137.

[1] A. P. Herbert, *Uncommon Law* (1935), pp. 1 *et seq.*

[2] [1953] A.C. 180.

[3] *ibid.,* at p. 189.

[4] *The Times,* April 27, 1956.

one is driving at a high speed and does something in the excitement of the contest does not mean that he can be excused. They have to exercise the reasonable skill and care required by a competent driver.' My colleague Mr. Whitfield, of the Psychology Department of this College, has written that it has been calculated that, given equal brakes, a person driving at forty-five miles an hour in a stream of traffic ought to allow something like a 90–100 feet gap between himself and the car in front. But if he did, he would simply be overtaken by the car behind.[5] So he takes a chance and reduces the gap. Or take another example. If you were facing a bowler like Lindwall or Tyson at his best, how much reasoning would precede your actions? By the time you had thought consciously what you were going to do your stumps would be flying.

The truth is that in circumstances such as these man cannot live by reason alone.[6] Reasoning is essentially a conscious process. But in many situations we have to rely on something else. Perhaps it is the subconscious mind. If it is, the subconscious mind works, not by reason, but by analogies, similarities and suggestion.[7] Or perhaps it is the unconscious mind, which stores up a number of past impressions for future use. So we take risks, trusting blindly that, given the appropriate stimulus, our unconscious minds will react sufficiently quickly and correctly to enable us to take the right action. And the more skilled we are the more risks we take. The attitude of the law to this risk-taking may be summed up in the proposition that you need not guard against risks which a reasonable man could reasonably foresee. In *Glasgow Corpn.* v. *Muir,* Lord Macmillan said that the judge must decide 'what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen.'[8] In *King* v. *Phillips,* Denning, L.J., put the matter thus: 'The test is not what the negligent party himself could reasonably have foreseen, for he rarely has time to foresee anything. The test is what a "hypothetical reasonable observer could reasonably have foreseen."'[9] At least that admits that the negligent party often has no time to think. But he is still put into the position of a person who foresees. What he foresees with is less apparent. Does the 'hypothetical reasonable observer' reason with a conscious mind which *ex hypothesi* he does not possess? Or is his unconscious mind supposed to have been subjected to a stimulus which, equally *ex hypothesi,* he did not experience? No wonder Lord Justice Denning was not certain whether to place him 'in the driver's seat or in an observation post on high.' Maybe it would be better not to attribute a brain to the reasonable man at all, but to examine what he usually does rather than what he is supposed to think.

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[5] J. W. Whitfield, 'Men, Machines and Accidents' (1956) 37 *The Mining, Electrical and Mechanical Engineer,* p. 137. I am indebted to Mr. Whitfield, and also to Dr. Kelvin, of the Psychology Department of University College, London, for their advice on a number of points which are more familiar to them than they are to me.

[6] J. A. Hadfield, *Dreams and Nightmares* (1954), p. 118.

[7] *ibid.*

[8] [1943] A.C. 448 at 457.

Even if the reasonable man is supposed to reason, it is clear that the circumstances in which he is used as a yardstick do not always require him to think. For example, if we are talking about reasonable price or reasonable quantity or reasonable notice it is difficult to see why reasoning should be relevant at all. And a capacity to reason is quite irrelevant when it is sought to reduce murder to manslaughter on the ground of provocation. Indeed the more the accused has reasoned in these circumstances the more is he likely to be convicted of murder because his reasoning may emphasise the degree of his premeditation. It follows that in some cases 'reasonable' has little or nothing to do with the power of reasoning. The distinction was brought out recently in a letter to *The Times* beginning: 'Sir,—The reasonable tone of Mr. Hillman's letter in your issue of August 30 is welcome, but I do not find his reasoning to the point, or easy to follow.'[10]

### THE SANE MAN

2. *Having sound judgment; sensible, sane, rational (in the sense of being able to exercise one's reason in a proper manner).* *R.* v. *Ward*[11] was a prosecution for murder. The accused was a man of proved subnormal intelligence. He had a child eighteen months old. When she cried he lost his temper and shook her with such force that the child died. He said that he intended neither to kill nor to hurt the child, but only to make her be quiet.

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[9] [1953] 1 Q.B. 429 at 441.

[10] *The Times,* August 3, 1956.

[11] [1956] 1 Q.B. 351. On this case, see Sidney Prevezer, 'Murder by Mistake' [1956] *Crim. L.R.*, p. 375.

Would a reasonable man have contemplated that death would result from what he did? If so, the accused was guilty of murder. If not, he was guilty of manslaughter. But what was meant by a reasonable man here? Lord Goddard, C.J., referred to him as a person who cannot set up a plea of insanity.[12] I would make four criticisms of this definition: (a) It rests on the fallacy that the reasonable man is always a reasoning man. (b) It would include—(i) those who, though suffering from mental disease, cannot succeed in pleading insanity because they do not satisfy the legal tests of insanity; (ii) those who do not suffer from mental disease but are mental defectives. All these persons are to be regarded, apparently, as having the thinking capacity of a reasonable man. (c) The result of it is that to reduce a charge of murder to one of manslaughter there are two kinds of reasonable men. One kind has been described as a 'paragon of virtue'[13]; only when such a man would be provoked will provocation given to the accused reduce his crime to manslaughter. The other kind is the man who, in Lord Goddard's view, is to be regarded as capable of realising the possible effects of his act even though he may fall within one of the classes I have just mentioned. (d) The definition is pointless because if a man can plead insanity there is little point in reducing the charge from murder to manslaughter. He is really not guilty at all.[14]

### AGREEABLE TO REASON

3. *Agreeable to reason; not irrational, absurd or ridiculous.* In this sense Sheridan makes Captain Absolute say to Sir Anthony: 'Sure, sir, this is not very reasonable, to summon my affections for a lady I know nothing of!'[15] Perhaps it was also in this sense that counsel argued in *Newberry* v. *Cohen's (Smoked Salmon) Ltd.*[16] that reasonable people did not eat raw kipper. On that Donovan, J., commented: 'When one gets down to an

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[12] *ibid.*, at p. 356.

[13] Glanville Williams, *loc. cit.*, p. 742.

[14] Section 2 of the Homicide Act, 1957, provides that a person suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions shall be liable to be convicted of manslaughter, not murder.

[15] *The Rivals*, II, i.

[16] *The Times*, April 27, 1956.

article of food it is impossible to conceive of the reasonable person.' The question in the case was whether raw kippers constituted meals or refreshments within the meaning of the Fifth Schedule to the Shops Act, 1950. If they were, a shop could be open on Sunday for serving them to customers. A Divisional Court held that a raw kipper could be a meal or refreshment. 'Think of the incongruity,' said Lord Goddard, 'you can sell smoked salmon, you can sell smoked trout, smoked eel and other varieties of herring, and yet it is said that you cannot sell smoked herring—namely a kipper.' *The Times* report does not state whether the court in fact appealed to the standards of the reasonable man, but the decision is certainly agreeable to reason. I hope I shall not be misunderstood if I say that this meaning of 'reasonable' is not a very common one in law. In a very slight degree it may be apt when the law requires that a custom, to be valid, must be reasonable.[17] Generally, however, the meaning of 'reasonable' in relation to custom is somewhat technical. That certainly was the view of Coke.[18]

### PROPORTIONATE

4. *Of such an amount, size, number, etc. as is judged to be appropriate or suitable to the circumstances.* The word 'reasonable' is sometimes used to mean not extravagant or excessive—and even inexpensive, as for example when Washington Irving wrote that 'this part of Paris is tranquil and reasonable.'[19] Such meanings set only an upper limit. They are applicable where a plaintiff complains of a nuisance causing him discomfort; for the law does not regard trifling inconveniences,[20] however annoying they may be. If the interference with the plaintiff's comfort is due to the malice of the defendant, it becomes unreasonable and excessive and is therefore a nuisance.[1] But when we talk of reasonable price, reasonable time and so on, we are really fixing both an upper and a lower limit—and 'reasonable' then

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[17] See *Tyson* v. *Smith* (1838) 9 Ad. & E. 406.

[18] Co.Litt. 62a. And see *Johnson* v. *Clark* [1908] 1 Ch. 303, per Parker, J., at p. 311.

[19] Washington Irving, *Life and Letters,* I, p. 148.

[20] *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L.C. 642, *per* Lord Wensleydale, at pp. 653–4.

[1] Winfield, *Tort* (6th ed. 1954), p. 549. See *Gaunt* v. *Fynney* (1872) L.R. 8 Ch. 12; *Christie* v. *Davey* [1893] 1 Ch. 316; *Hollywood Silver Fox Farm Ltd.* v. *Emmett* [1936] 2 K.B. 468.

means something between 'not too much' and 'not too little.' However, the courts often do use 'reasonable' in the sense of a standard appropriate to the circumstances. Whether an act causing discomfort to the plaintiff amounts to a nuisance 'depends greatly on the circumstances of the place where the thing complained of actually occurs.'[2] In actions for negligence we are frequently told that our standard must be the conduct of a reasonable man placed in the same circumstances as the party in question.[3] And even when it is sought to use provocation as a ground for reducing murder to manslaughter, the jury is directed to consider the reactions of a reasonable man in the circumstances of the accused.[4] Not only that, but the resentment shown by the accused must bear a reasonable relationship to the provocation.[5] Nevertheless, in all these cases, there are limits to the circumstances which the court is entitled to consider, and very rarely is allowance made for individual defects. The position is well summed up by Sir Carleton Allen, who writes[6]: 'As to his sensibilities, the law considers Styles (*i.e.*, the reasonable man) to be, if not quite pachydermatous, at least protected by a hide of serviceable toughness. He is not a neurotic who will shrink and wither at every aspersion cast upon him. His back is broad enough to bear a normal amount of hostile criticism and therefore he cannot claim damages for "mere pain of mind," if he chooses to fret unduly about such criticism, or even abuse.'[7] 'He must not be hypersensitive about the common noises and smells and inconveniences which are inseparable from ordinary dwelling-houses in ordinary localities; for an over-delicate temperament receives little sympathy from the law.'[8]

There is, however, a somewhat uneven pattern of allowances for individual defects. A one-legged man cannot be expected to have the same agility as a hurdler. A blind man is not expected to have the vision of a man with perfect sight. And the same applies to all persons with physical handicaps.[9] In practice, however, this means only that a person with a physical defect cannot be expected to show the same degree of care as the reasonable man in guarding himself against dangers. It does not necessarily mean that he is less liable for negligence. On the contrary; for if he knows of his defect he is expected to take even more care than the reasonable man not to expose others to danger.[10] But it seems that the standard of care required from children is the same whether the child is plaintiff or defendant. The child's yardstick is the reasonable child of the same age, intelligence and experience or some other similar combination of qualities.[11] Of course the stage at which the child reaches physical and mental maturity varies with the individual. In *Charbonneau* v. *MacRury,* a case before the Supreme Court of New Hampshire in 1931, Snow, J., thought that when the child acquires 'the capacity for observation, reasoning and action of the average prudent adult, this circumstance places him on a parity with the latter.'[12] It would be interesting to ask how often and how a court obtains evidence of this maturity. Judge Snow said that the age at which maturity is in fact reached cannot be determined with mathematical accuracy, and therefore that the necessities of society require that some age should be considered as prima facie evidence of maturity. Shulman suggests that there is a presumption that the child has the intelligence and experience common to children of its age and that the burden of proving backwardness is on the child.[13] Today it is possible to ascertain the level of a person's intelligence with reasonable accuracy—and not only intelligence but even the level of certain other qualities. I can see no reason why evidence of the level of a measurable quality—whether it be intelligence, mechanical aptitude, reaction time or anything else—should not be given wherever it is relevant. In 1927 it may have been possible perhaps for Dean Seavey to differentiate between physical and mental characteristics on the ground that many of the former are more easily observable or demonstrable.[14] That differentiation is less possible today. But I repeat that it is still essential that the level of the particular characteristic in question should be relevant to the issue. In particular, if a person is deficient in a mental characteristic I would doubt whether that was relevant unless he himself was aware of it. Thus there is little point in proving that a man's reaction time is slower than average unless the person sought to be made liable, whether it be that man or his employer, is or ought to be aware of the fact.

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[2] *St. Helen's Smelting Co.* v. *Tipping* (1865) 11 H.L.C. 642, *per* Lord Westbury, C., at p. 650.

[3] *e.g., Wakelin* v. *London & South Western Ry. Co.* (1884), [1896] 1 Q.B. 189 n., *per* Brett, M.R., at p. 191.

[4] *R.* v. *Welsh* (1869) 11 Cox C.C. 336 at 338; *Kwakah Mensah* v. *The King* [1946] A.C. 83 at 93.

[5] *R.* v. *Mancini* [1942] A.C. 1, *per* Viscount Simon, L.C., at p. 9.

[6] C. K. Allen, *Legal Duties* (1931), pp. 86 *et seq.*

[7] *ibid.*, p. 88.

[8] *ibid.*, pp. 92–3.

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[9] Warren A. Seavey, 'Negligence—Subjective or Objective' (1927) 41 *Harvard Law Review,* p. 1, at pp. 13–17.

[10] *ibid.,* pp. 17, 22–3.

[11] Harry Shulman, 'The Standard of Care for Children' (1928) 37 *Yale Law Journal,* p. 618.

[12] (1931) 153 Atl. 457 at 463.

[13] *loc. cit.,* p. 622.

Time and space do not permit me to go into the other side of the question, *viz.*, whether the defendant is liable for damage to super-sensitive persons or persons with physical or mental defects, even though he may not know of their presence within the range of his mischievous activity.[15] It would seem that the defendant 'is entitled to assume that the "average man in the street" is a person of reasonably normal condition.'[16]

Turning again to the subject of provocation and homicide, we find that the judges have made even less allowance for human frailty. They have attributed to the reasonable man a set of virtues which place him on a much higher pedestal than his counterpart in the law of tort. Dr. Edwards has summed up the present position in this way[17]: 'They say he is not impotent and he is not normally drunk. He does not lose his self-control on hearing a mere confession of adultery, but he becomes unbalanced at the sight of adultery provided, of course, that he is married to the adulteress. Furthermore, he remains in control of his emotions notwithstanding the vilest form of oral provocation and, finally, even if he loses his control he is expected to resort to no more than reasonable measures of retaliation.' Dr. Edwards thought that as long as death was the invariable punishment for murder the law could not be otherwise, though he preferred that the question of what constituted provocation should be left entirely to the jury.[18]

The Homicide Act, 1957, however, has now limited the application of the death penalty to certain specified cases.[19] It also provides that it shall be left to the jury to decide whether the provocation is enough to make a reasonable man do as he did.[20] Whether this latter provision will bring down the level of the reasonable man from his present exalted position remains to be seen. Before the Royal Commission on Capital Punishment the judges supported strongly the test of the reasonable man.[1] Nevertheless there was some evidence before the Commission suggesting that the test was inequitable and should be abolished.[2] The witnesses argued that 'if the accused is mentally abnormal or is of subnormal intelligence or is a foreigner of more excitable temperament or is for some other reason particularly susceptible to provocation, it is neither fair nor logical to judge him by the standard of the ordinary Englishman.' In so far as any of these defects are capable of adequate proof it is submitted that there is no logical reason, as distinct from any reason of policy, why they should not be taken into account. Now that the Homicide Act has been passed, the way may perhaps be open. As the law stood before the Act the foreign visitor to England would not only be subject to English law but also had to accept the standards of the reasonable Englishman. If that is still true, would it be too flippant to suggest that, even at the risk of reducing the tourist traffic to England, a guide to these standards should be issued to all intending visitors, perhaps by the Foreign Office or Cook's?

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[14] *loc. cit.*, p. 15.

[15] See John Havard, 'Reasonable Foresight of Nervous Shock' (1956) 19 *Mod. L.R.*, p. 478.

[16] *ibid.*, p. 496.

[17] J. Ll. J. Edwards, 'Provocation and the Reasonable Man—Another View [1954] *Crim. L.R.*, p. 898, at p. 900. See, also, Prevezer, *loc. cit.*, at p. 377.

[18] *loc. cit.*, at p. 906.

## PROBABLE

5. *Probable.* This meaning is not found in the *Oxford Dictionary,* though Roget's *Thesaurus* gives it as a synonym of reasonable. But the cases do not always reflect this identity of meaning. Thus in *Broad* v. *Ham* Tindal, C.J., said: 'In order to justify a defendant, there must be a reasonable cause—such as would operate on the mind of a discreet man: there must also be a probable cause—such as would operate on the mind of a

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[19] Homicide Act, 1957, ss. 5, 6.

[20] *ibid.,* s. 3.

[1] Royal Commission on Capital Punishment (1949–53), Cmd. 8932, para. 142.

[2] *ibid.,* para. 141. An attempt to leave out of the Homicide Act, 1957, s. 3, the words 'a reasonable man' was defeated. See *Parl. Deb., Official Report,* House of Commons, 1956, Vol. 561, cols. 498–534.

reasonable man.'[3] But in most decisions on malicious prosecution reasonable cause and probable cause are regarded as identical.[4]

Probability is, I think, far more frequently an ingredient of judgment than is supposed, though often it is based on hunch rather than on scientific reasoning. For example, there is no need to guard against the improbable or the fantastic. Maybe the court makes a rough guess as to what the odds are against the occurrence of the event in question, having regard to the evidence and perhaps also the personal experience of the court itself. In so far as the estimate of probability is based on the guesses of individuals it can be said to be subjective, dependent on the experience and the imagination of each individual. But strictly, as Lord Keynes has pointed out, a proposition is not probable because we think it so. 'When once the facts are given which determine our knowledge, what is probable or improbable in these circumstances has been fixed objectively, and is independent of our opinion.'[5] Let us look at two tort cases and two contract cases to see how far the court has resorted to hunch and how far to scientific reasoning. In *Fordon* v. *Harcourt-Rivington*[6] the defendant left his airedale dog in his car which he parked against the pavement. As the plaintiff walked past the car the dog became excited, jumped up against the rear window of the car and smashed a panel of it causing a glass splinter to fly out and damage the plaintiff's eye. Lord Dunedin said: 'Who ever heard of a dog breaking a window at such an angle as to send a fragment of glass into the eye of a passer-by?' Call that 'hunch' if you like, but hunch sometimes means an intelligent estimate of probability based on human experience. But what happens in the next case on all fours with this one? How many such cases must occur before this kind of accident is within the ordinary range of common experience? That kind of question *is* answered when we are dealing with liability for animals and the doctrine of *scienter*. In this case *one* example of viciousness in the animal is regarded as having sufficient statistical significance to fix its owner with liability for a future

[3] (1839) 5 Bing. N.C. 722 at 725. See, also, *Jones* v. *Ginn* (1713) 1 Gilb. 185, *per* Parker, C.J., at p. 187.
[4] *e.g.*, *Hicks* v. *Faulkner* (1881) 8 Q.B.D. 167 at 171.
[5] J. M. Keynes, *A Treatise on Probability* (1929), p. 4.
[6] (1932) 146 L.T. 391.

vicious act. Yet who would say that a man is a habitual drunkard merely because he was seen on one occasion only to be staggering out of a public house? In *Bolton* v. *Stone*[7] a cricketer drove a ball straight out of the ground and injured a passer-by. In all the ninety years in which cricket had been played on this ground no such accident had ever happened. In thirty years only six balls had been hit out of the ground. In this case the learned Law Lords approached more nearly the scientific method. In particular Lord Normand said: 'The findings of fact show that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting any one in Beckenham Road is very slight.'[8] *Sapwell* v. *Bass*[9] was a case in which the judge took into account all the possibilities without entering into any statistics. The defendant owned a stallion called Cyllene. He agreed that this stallion should serve one of the plaintiff's mares during the 1909 season for a sum of £315. But in 1908 he sold the stallion to a buyer in South America and so was unable to fulfil his contract. The plaintiff proved that his profit on selling foals by the same stallion out of his other mares in previous years considerably exceeded £315. His claim for damages was based on the footing that he had probably lost a valuable foal; but he was held entitled only to nominal damages. Jelf, J., pointed out[10] that his expectation of profit was based on a number of contingencies which could not be foretold more than a year beforehand; and he stated each of those contingencies in a manner which showed that he had carefully weighed the chances of Cyllene in fact siring a profitable foal out of one of the plaintiff's mares. But he held in effect that the odds against this happening were so great that a claim based on that possibility could not succeed. A more interesting piece of mathematical calculation took place in the following year in *Chaplin* v. *Hicks*,[11] a case concerned with a different kind of stock-breeding. In those happy days selection for the chorus in a West End theatre meant a fair possibility of marrying into the peerage. Mr., later Sir, Seymour Hicks published a letter in a newspaper offering to engage twelve ladies selected by readers from photographs printed in the paper. By an eliminating process an original number of 6,000 entrants was reduced to fifty, from whom Mr. Hicks himself was to select the final twelve. Miss Chaplin became one of the fifty, and indeed had gained the top place in her district. But the letter asking her to call at the Aldwych Theatre in London on the afternoon of January 6 reached her in Dundee on that day. Dundee is 450 miles from London and Miss Chaplin had neither aeroplane nor wings; and in spite of all her efforts she could not get another appointment. Mr. Hicks made his selection and Miss Chaplin was not one of the twelve. A jury found that Mr. Hicks had not taken reasonable steps to give her an opportunity of presenting herself for selection and assessed damages at £100. On appeal, Vaughan Williams, L.J., estimated that her chances were about one in four. As a matter of interest, Lord Keynes comments that the jury cannot have argued as subtly as this because the average value of a prize could not have been fairly estimated to be so high as £400. Perhaps the jury rather naughtily took into account the possibility of the plaintiff marrying into the peerage and added a little bit extra by way of compensation for the loss of that possibility!

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[7] [1951] A.C. 850.
[8] *ibid.*, at p. 862.
[9] [1910] 2 K.B. 486.
[10] *ibid.*, at p. 492.
[11] [1911] 2 K.B. 786.

The essence of probability is that it is not mathematical precision. Lord Mansfield once said: 'As it seldom happens that absolute certainty can be obtained in human affairs, therefore reason and public utility require that judges and all mankind, in forming their opinions of the truth of facts, should be regulated by the superior number of probabilities on one side and on the other.'[12] The degree of probability can sometimes be reached by mathematical calculation, as in *Chaplin* v. *Hicks*. Or it can be obtained by elimination as in *Sapwell* v. *Bass*. Or again it can be estimated by a system of rating on a scale of values. Bentham proposed a scale on which witnesses might mark the degree of their certainty about the facts of which they were giving evidence.[13] The mechanics of the process of rating can be shortly stated in the words of Lord Keynes: 'The so-called magnitudes or degrees of knowledge or probability, in virtue of which one is greater and another less, really arise out of an *order* in which it is possible to place them. . . . When . . . we say that one probability is greater than another, this precisely means that the degree of our rational belief in the first case lies *between* certainty and the degree of our rational belief in the second case.'[14] In an American work on probability we find this statement: 'A practical decision is reasonable if it is made according to the probabilities with respect to the available evidence, even if it turns out to be not successful.'[15] But in the last resort, and only in the last resort, the court has to rely on its own experience and even on guesswork. In *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery,* Lord O'Hagan ruled out guesswork and insisted on a reference to ordinary experience.[16] But in *Chaplin* v. *Hicks,* Vaughan Williams, L.J., frankly admitted that in an action for breach of a contract of sale of goods, where there is no market for those goods, 'the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork.'[17]

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[12] In *The Douglas case*, quoted by Best, J., in *R.* v. *Burdett* (1820) 4 B. & Ad. 95 at 122.

[13] Bentham, *Rationale of Judicial Evidence*, I, vi.

### ORDINARY, CUSTOMARY, AVERAGE

6. *Ordinary, customary, average.* None of these meanings appears in the *Oxford Dictionary*; nor does Roget's *Thesaurus* mention any of them as a synonym of 'reasonable.' But these are by far the most common equivalents of that term in the cases, especially the cases on negligence.[18] Professor Max Gluckman's examination of the judicial process among the Barotse of Northern Rhodesia contains an abundance of examples to prove that the judges are guided by the norms of customary behaviour around them.[19] Because the courts often use a phrase which he translates by 'a man of sense,' Gluckman deduces that they apply the standards of the reasonable man.[20] But most of the cases he cites show that the judges are primarily concerned with what is usual and customary, without regard to whether it is

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[14] *op. cit.*, p. 35.

[15] Rudolf Carnap, *Logical Foundations of Probability* (1950), p. 181.

[16] (1878) 3 App.Cas. 1155 at 1183.

[17] [1911] 2 K.B. 786 at 792.

[18] See, *e.g.*, *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Exch. 781 at 784.

[19] *op. cit.*, *passim.*

[20] Gluckman, *op. cit.*, p. 125.

also sensible or rational. The truth may be that the ordinary conduct of ordinary men is usually sensible because they do not normally do things which are harmful to themselves or to others. Now let us look at this pattern of usual conduct in the light of a series of propositions.

(a) *The ordinary is normally a safe guide.* That is accepted in many cases. In most cases the judges refer to 'ordinary care' or 'ordinary prudence' without any qualms or qualifications. In *Wright* v. *Cheshire County Council* Singleton, L.J., could not see how the defendants could be negligent if they adopted the well-recognised practice.[1] Birkett, L.J., was a little more cautious and said that at any rate they would be in a position of considerable strength to answer a charge of negligence.[2] A similar view was expressed by Lord Tucker in *General Cleaning Contractors Ltd.* v. *Christmas.*[3]

(b) *There is generally no need to resort to the extraordinary.* Thus in *Whiteford* v. *Hunter*[4] all the medical witnesses asserted that it was against approved English medical practice in 1942 to use a cystoscope for examining the bladder where there was acute urinary retention. An American urologist, however, said that the use of a cystoscope was usual and ordinary. Maybe it was so in the United States, but it was not usual at that time in this country and so the defendant was not liable for negligence. So, too, in *Carminer* v. *Northern and London Investment Trust Co., Ltd.*[5] the House of Lords was not prepared to demand from the reasonable landowner the knowledge possessed by scientific experts on tree-growing. In *Snook* v. *Grand Junction Waterworks Co., Ltd.*, Baron Huddleston directed the jury that they were not bound to ransack science in the hope of discovering some scientific specific against possible accident; they were only bound to use well-known scientific means.[6] And Baron Bramwell frequently warned against the danger of being too wise after the event.[7] Necessity often drives the reasonable man to produce an invention.

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[1] [1952] 2 All E.R. 789 at 792.

[2] *ibid.*, at p. 795.

[3] [1952] A.C. 180 at 195.

[4] (1950) 94 Sol.Jo. 758.

[5] [1951] A.C. 88.

[6] (1886) 2 T.L.R. 308 at 310.

[7] *e.g.*, *Hart* v. *Lancashire & Yorkshire Ry. Co.* (1869) 21 L.T. 261 at 263; *Carstairs* v. *Taylor* (1871) L.R. 6 Ex. 217 at 222.

(c) *Nevertheless, if the ordinary is not reasonable, the proper standard to apply is the reasonable and not the ordinary.* This proposition is certainly laid down in some of the cases. In *Blenkiron* v. *Great Central Gas Consumers' Co.* Cockburn, C.J., said: 'Those who carry on operations dangerous to the public are bound to use all reasonable precautions—all the precautions which ordinary reason and experience might suggest to prevent the danger.' So far, so good. But he then went on to say: 'It is not enough that they do what is usual if the course ordinarily pursued is imprudent and careless.' And then later: 'In considering what is reasonable, it is important to consider what is usually done by persons acting in a similar business.'[8] This may seem quite confusing. If the reasonable is the usual it cannot logically be something higher than the usual unless reasonable means something else. But the same apparent illogicality is to be found in the more recent case of *General Cleaning Contractors Ltd.* v. *Christmas*,[9] both in the Court of Appeal and in the House of Lords. Denning, L.J., declared that the employer's duty was to take reasonable care to protect his employees.[10] But almost in the same breath he said that the employers had to take *proper* steps, and that it was not enough if the usual practice was followed. That view was accepted by the House of Lords, where Lord Oaksey put the matter in this way[11]: 'A plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade undertakes a heavy onus; if he is right it means that all, or practically all, the numerous employers in the trade have been habitually neglecting their duty to their men.' In other words the usual practice is not reasonable because it is dangerous.

It is submitted that, when a judge says the usual is not reasonable the term 'reasonable' is applied in two different senses. On the one hand there is the lower standard; this is reasonable because it is usual. On the other hand there is the higher standard; this is reasonable because the judge calculates or guesses, as a matter of probability, that it will produce less danger than the lower standard. So we have a contrast between

[8] (1860) 2 F. & F. 437 at 440.
[9] [1952] 1 K.B. 141; [1953] A.C. 180.
[10] [1952] 1 K.B. 141 at 149.
[11] [1953] A.C. 180 at 192.

the reasonable-usual and the reasonable-probable. And in the cases I have mentioned the judge has preferred the latter. On one view he is legislating because he has fixed the higher standard which should be adopted. Indeed, perhaps he is being progressive. As Bernard Shaw wrote[11a]: 'The reasonable man adapts himself to the world: the unreasonable man persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man.' On another view he is merely applying his version of reasonableness based on probability. The distinction between the two meanings of reasonable and their application was brought out by Lord Normand in *Paris* v. *Stepney Borough Council.* 'If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.'[12] But you will see that Lord Normand would depart from the usual only where the usual could not be proved. In other words if the usual can be proved, there is no need to have recourse to other standards. But if the usual cannot be proved it may be necessary to consider the respective danger-probabilities of several courses of action. That is quite different from substituting the less dangerous for the usual practice in *all* circumstances. Another aspect of the same problem is to be found in *Acebal* v. *Levy,* where Tindal, C.J., preferred the reasonable price to the current price because the current price might have been highly unreasonable from accidental circumstances.[13]

## SOME FUNDAMENTAL QUESTIONS

I have left to the last a few fundamental questions.

(a) *What is the ordinary and how is it measured?* Some prefer to speak of the 'standard' man rather than the reasonable man.[14] Or sometimes we hear of 'average' persons.[15] But at what level do we find the average, the standard, or the ordinary? Let us begin by suggesting that there is no such person as the average person; there is only an average number or an average amount. For example, suppose that there are 500 members on the staff of this college and that the total number of children they have is 1,750. It would be quite wrong to say that the average member of the staff has 3.5 children because children only come in whole numbers. But you can say that the average number of children per member of staff is 3.5.[16] We can therefore speak of average number or quantity of something. We can say that the average height of students in the Law Faculty is 5 ft. 6 ins; and we can discover that by mathematical calculation. But how does a court discover the average or ordinary or standard amount of intelligence, prudence, skill or whatever it may be that is relevant to the issue before it? Indeed is it a mathematical average they are looking for? Or does 'average' really mean something else? It is an elementary statistical fact that if you take an unselected cross-section of the population and measure them for any quality you will be able to plot the result on a curve which looks like a cocked hat. Suppose that your sample consisted of 100 persons and you divided them into five classes. You might find ten each in the bottom and top classes, twenty each in the second and fourth classes, and forty in the third or middle class. Your ordinary persons are presumably in the third class. But a method like this can only be used satisfactorily if you have a measurable quality and a standard measuring instrument. It is possible in this way to measure, for example, height, heat, intelligence, reaction time, hearing capacity, volume of sound and a number of other qualities. There would be very much greater difficulty in using this method to measure such qualities as courage or prudence or honesty, and in these case it may be desirable to rely on the method suggested by Lord Keynes for measuring probability. But obviously this method of measurement is less precise.

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[11a] Shaw, *Maxims for Revolutionists,* p. 238.

[12] [1951] A.C. 367 at 382.

[13] (1834) 10 Bing. 376 at 383.

[14] See, *e.g.,* Henry T. Terry, 'Negligence' (1915–16) 29 *Harvard Law Review,* p. 40, at p. 47.

[15] See, *e.g., Johnson* v. *Clark* [1908] 1 Ch. 303 at 311; *Charbonneau* v. *MacRury* (1931), 153 Atl. 457 at 462; *R.* v. *McCarthy* [1954] 2 Q.B. 105 at 112.

(b) *Is the ordinary person expected to have the same degree of every quality which is relevant to the situation in question?* I have said that there is no such person as an average person. But, further, the average quantity of one quality may and does frequently differ from the average quantity of another quality.

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[16] Leonard J. Holman, *Simplified Statistics* (1938), p. 40.

For example, in 1944, while testing soldiers suffering from neurosis, I discovered that their level of mechanical aptitude was significantly lower than their level of intelligence. It has been found that there is practically no correlation between reaction time and intelligence, even where the reaction time test involved choosing between several signals.[17] It has also been shown that reaction time has little or nothing to do with variations in acuity of sight or hearing.[18] Evidence of this kind suggests that it is completely inaccurate to speak of the reasonable man, and for two main reasons: (i) Strictly speaking there is no dichotomy in qualities. Thus we cannot say that a person is reasonable or unreasonable, intelligent or unintelligent. There are only varying quantities of the particular quality. It is better, therefore, to use the adverb 'reasonably' and attach it to the quality or qualities we are looking for, *e.g.*, reasonably prudent, reasonably intelligent, reasonably skilful, etc.—even, perhaps, reasonably reasonable! (ii) The court has to consider what qualities are relevant to each situation and then decide what level of each quality is the ordinary level. In other words what is needed is a profile of the relevant qualities. Thus one situation may need much courage, less intelligence and only a little tact. Another situation may need quick reaction time, little intelligence and a great deal of experience.

(c) *How does the court know what is ordinary?* Of course witnesses can give evidence as to what is usual and ordinary, and indeed that sometimes happens. But in very many cases it is the judge or a jury who has to decide what is the ordinary conduct of the reasonable man. A jury, making use of the judge's direction, the evidence before it and the sum of its experience, tries to give its view of what the ordinary man would do in the circumstances.[19] When the jury comes from the locality where the event took place and is acquainted with the ordinary habits of that locality, its usefulness is fairly clear. Lord Goddard pointed that out in delivering the judgment of the Judicial Committee of the Privy Council in *Kwaku Mensah* v. *The King*.[20] But without that local knowledge one can only hope that between them the members of the jury manage to iron out extreme points of view and reach a satisfactory mean. Twelve persons are hardly an adequate representative sample of the population—one would certainly not rely on their opinions, for example, in the Gallup poll. And all kinds of factors could make them even less representative—for example, the influence of a dominant juryman or even a prevailing temporary current of political feeling. But sometimes the opinion of a jury is overruled in effect by the Court of Appeal. Let me quote Sir Carleton Allen again: 'Clothe it in whatever politenesses you will, the only true meaning of this corrective process is: "You, members of the jury, are not average reasonable men; we, on the other hand, *are*." And, with the greatest respect to the ancient and honourable institution of the jury, *so they are*. Generally.'[1] But does a judge know how the ordinary man behaves? Apparently yes, if he is one of the Barotse; for Professor Gluckman tells us that the judges do not ask for proof of what is customary 'because they themselves participate freely in the life of a largely homogeneous people.'[2] Is that true of English judges? In *Wakelin* v. *London and South Western Ry. Co.* Brett, M.R., said that in ninety-nine cases out of a hundred the judge is not so competent as the jury to answer the question whether there has been negligence.[3] In *Crook* v. *Jadis*, Taunton, J., said that he could not estimate the degree of care which a prudent man should take.[4] To counterbalance this candour or modesty, in *Watson* v. *Clark* Lord Eldon said: 'Though I do not pretend to much skill in nautical matters, yet I have been in a situation where I had an opportunity of hearing more of the conversation of seamen than perhaps any judge on the bench.'[5] Of course the judge has to use his ability to reason and the sum total of his knowledge and experience, whether he has acquired it personally or at second hand. We may assume, I think correctly, that in intelligence, in range of knowledge and in experience of reasoning a judge is in the very top grade of the population. I have no doubt that the combination of these factors is sufficient in the majority of cases to produce a satisfactory appreciation of ordinary standards of conduct. But there are at any rate three dangers which every judge has to face:

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[17] E. G. Chambers, *Psychological Tests for Accident Proneness and Industrial Efficiency* (1955), Medical Research Council Memorandum, No. 31.

[18] Y. Koga and G. M. Morant, 'On the Degree of Association between Reaction Times in the case of Different Senses' (1923) 15 *Biometrika*, p. 346. In *The Autocar*, November 9, 1956, the reaction time for a healthy quick-witted person is given as 0.7 sec.; for an average good rally driver, 0.5 sec.; for the majority of racing drivers, 0.35–0.4 sec.; best time for Stirling Moss, 0.25 sec.

[19] See *R.* v. *McCarthy* [1954] 2 Q.B. 105 at 112.

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[20] [1946] A.C. 83.

[1] Allen, *op. cit.*, p. 72.

[2] Gluckman, *op. cit.*, p. 239.

[3] (1884) [1896] 1 Q.B. 189 n. at 191. See, also, *R.* v. *Burdett* (1820) 4 B. & Ald. 95, *per* Abbott, C.J., at p. 162.

[4] (1834) 5 B. & Ald. 909 at 910.

[5] (1813) 1 Dow 336 at 345.

(i) That the conditions of his life or his work may be such that he is no longer in contact with the ordinary standards of ordinary men.[6]

(ii) That, because he realises that he is in the top grade of the population, he may over-compensate by trying too hard not to expect too much of the ordinary man.

(iii) That he may rely on bare hunch instead of working out the probabilities carefully.

If any of these dangers does occur, there is the added risk that one reasonable man may differ from another reasonable man; and unless there can be different shades of reasonableness one of them is bound to be unreasonable.[7]

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[6] For another view, see *R.* v. *Burdett* (1820) 4 B. & Ald. 95 at 162, where Abbott, C.J., spoke of 'lawyers, whose habits might be suspected of leading them to the indulgence of too much subtlety and refinement.'

[7] After this lecture was delivered, I noted the following passage in a review by Master A. S. Diamond of Professor Gluckman's book (*op. cit.*) in (1956) 5 *The International and Comparative Law Quarterly*, p. 624, at pp. 627–8: 'The present reviewer has come to the firm conclusion that the word "reasonable" which has become so common in English legal parlance during the last century, ought never to be used again. The word is convenient because it can be made to connote anything between, on the one hand, the whole of the relevant law, and, on the other hand, nothing. If an English judge holds that the defendant has not used reasonable care he means "The defendant has not used as much care as I hold that he ought." The "reasonable man" is not the man actuated by reason, or most men, or the usual or average man, but the man whom the judge takes as the standard.' I was reminded that some months ago Master Diamond and I were about to cross a busy road when I remarked: 'We must now use the care of the reasonable man.' He said: 'He doesn't exist, does he?' I replied: 'I doubt it.' But we still crossed the road safely.

## 7

# RECENT TRENDS
# IN
# CRIMINAL JUSTICE

### George J. Webber

In 1951 Professor Seaborne Davies delivered an Address before the Society of Public Teachers of Law entitled: 'The Court of Criminal Appeal: The First Forty Years.'[1] His paper, based on a consecutive perusal of the *Criminal Appeal Reports* until the end of 1948, is a comprehensive and well-balanced appraisal of what he rightly calls this 'final Court of Appeal.'

The following year the Lord Chief Justice, invited to address the Society, chose as his subject, 'The Working of the Court of Criminal Appeal.'[2] Lord Goddard's presidency of that court and his administration of criminal justice since 1946 constitute, if, with great respect, one may say so, a major contribution to the criminal law of this century. His magisterial judgments—often containing excursions into legal history—bear the stamp of courage, lucidity and vigour.

Professor Seaborne Davies's survey carrying us to the end of 1948, the Editors of *Current Legal Problems* invited me to take up the story at that point. 'Recent Trends in Criminal Justice': I propose to interpret the title in its widest connotation and to examine the general course, tendency or drift of recent decisions in criminal law, procedure and punishment.

Two general observations at the outset. First, the Criminal Justice Act, 1948, is the watershed between two outlooks on punishment. Not that probation and preventive detention are new: for years the courts, in striving to fit the punishment to the crime, had been thinking of the offender no less than the offence.[3] As Dr. L. Radzinowicz has shown,[4] English Criminal Policy, humanised in the nineteenth century, in the twentieth century had become more rational. But 1948 marks a change of outlook: the rehabilitation of the prisoner becomes the dominant theme.

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[1] 1 *Journal of the Society of Public Teachers of Law*, New Series (1951), p. 425.

[2] 2 *ibid.* (1952), p. 1.

[3] See *e.g.* the obituary on Lord Roche, *The Times*, December 24, 1956.

[4] 'Present Trends of English Criminal Policy,' *The Modern Approach to Criminal Law* (1948), pp. 27–38.

For my second general observation, I cite some words from Geoffrey Crowther—

> 'In modern history the great dividing lines have occurred round about the middle of the calendar centuries, not at their beginnings. It is in the 'forties or 'fifties of each century, not in the oos, that the great decisions have been reached which have sent Western civilisation off on a new tack. . . . *New men and new ideas get control in the 'forties and 'fifties, and, for a few decades, work out the new pattern.*'[5]

The observation may be applied to English Criminal Justice. Thus we have a great State Paper on Capital Punishment.[6] The proposal to abolish the Death Penalty evokes from both Houses of Parliament debates of high distinction.[7] The public conscience being profoundly disturbed by the laws on homosexuality, they are being re-examined by a representative committee. The test of obscenity in literature, unchanged since 1868,[8] is now being interpreted—though by no means universally—with a greater realism in view of the alteration in approach to the subject of sex.[9] A new attempt is made by the Road Traffic Act, 1956, a new Road Code and the exhortation of the Lord Chancellor on 'the powerful weapon of the driving ban,'[10] to stem what *The Times* has called 'the annual massacre on the roads.' In their modes of thought and reasoning, judges give expression to the collective conscience of the community. In every age, however, judges arise who do more: their judicial valour breaks down obsolete barriers and by condign severity or courageous leniency, or by raising or stiffening the legal standards, they attempt to guide the public conscience.

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[5] Quoted by R. J. Cruickshank in *The Roaring Century,* 1946, p. viii (my italics).

[6] Cmd. 8932—1953.

[7] *Parl. Deb., Official Report,* House of Commons, February 16, 1956, Vol. 548, cols. 2544–2664; House of Lords, July 9, 1956, Vol. 198, cols. 563–678; July 10, 1956, *ibid.,* cols. 681–841.

[8] *R.* v. *Hicklin* (1868) L.R. 3 Q.B. 360 at 369, for the charge of Cockburn, C.J., at p. 371.

[9] *R.* v. *Martin Secker Warburg Ltd.* (1954) 38 Cr.App.R. 124, and Stable, J.'s charge to the jury, at pp. 125–33.

See also J. P. Eddy, 'Obscene Publications: Society of Authors' Draft Bill' [1955] *Crim. L.R.,* pp. 218–26, Prof. Dennis Lloyd, 'Obscenity and the Law,' (1956) 9 *Current Legal Problems,* pp. 75–95, and a brilliant comparative and comprehensive study by Norman St. John-Stevas, *Obscenity and the Law,* 1956.

[10] Address by Viscount Kilmuir, L.C., *The Times,* September 25, 1956.

I propose to consider recent trends under the following headings—

1. Responsibility
2. Nature of Offences
3. Evidence
4. New Criminal Courts
5. Procedure
6. Punishment
7. Conclusion

### 1. RESPONSIBILITY

Under this heading, it will be convenient to deal with capital punishment, the proposal to abolish the death penalty, and the provisions of the Homicide Act, 1957.

The Royal Commission recommended the abolition of the doctrine of constructive malice and, by a majority, of the M'Naghten Rules.[11] No more illuminating exposition of these two problems can be found than in the lecture delivered at this College in 1954 by Sir Patrick Devlin, entitled 'Criminal Responsibility and Punishment: Functions of Judge and Jury.'[12] '. . . It is the death sentence and not the M'Naghten Rules which brings the law of insanity in murder cases into conflict with the moral law in many instances.'[13] Constructive malice is 'contrary to the fundamental principles of our criminal law, because it is a device for relieving the prosecution from the duty of proving the wicked intent appropriate to the crime.'[14] Thus the defence, to escape the verdict of murder, resorts to accident, provocation or mental blackout. Remove 'the illogical excrescences on the law of murder,' he urges, restore to the jury the consideration of the intent to murder and keep the prerogative for the act of clemency.[15]

Sir Patrick Devlin passes to analyse the principal M'Naghten rule: that the party accused 'was labouring under such a defect of reason from disease of the mind,[16] as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong.' Now in *R.* v. *Windle*[17] the prisoner had killed his wife by 100 aspirins; he knew he was doing an illegal act, but, through an insane condition, thought that what he was doing was right. Sir Patrick Devlin had withdrawn the issue of insanity from the jury and his action was upheld by the Court of Criminal Appeal, Lord Goddard saying that the real test was responsibility according to law and whether the prisoner knew that his act was *contrary to law.*

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[11] Paras. 123, 296, 332, 333. For the dissenting views, see pp. 284–7.

[12] [1954] *Crim. L.R.*, pp. 661–86.

[13] Sir Patrick Devlin agrees independently with these words cited from Dr. A. L. Goodhart's *English Law and the Moral Law*, 1953, p. 88; [1954] *Crim. L.R.*, p. 661, at pp. 685, 686.

[14] *ibid.*, at p. 666.

[15] *ibid.*, at p. 678.

This decision has not been followed by the High Court of Australia. In the powerful and exhaustive judgment in *Stapleton* v. *R.*[18] that court upheld the following direction—

> 'If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong.'

Similar, too, was the considered opinion of Cardozo, J., giving judgment as President of the New York Court of Appeals in *People* v. *Schmidt.*[19] Professor Glanville Williams has suggested the removal of the issue of insanity from the competence of the jury, leaving it to be decided, free of the M'Naghten rules, upon the report of three experts,[20] but this runs counter to English ideas of criminal justice.[1]

The Debates upon the Death Penalty (Abolition) Bill, 1956—a private member's Bill which passed the House of Commons but was rejected by the House of Lords—exhibited a profound cleavage of opinion, both popular and instructed: the same facts and statistics lead to inferences diametrically opposite.[2] The truth seems to be that it is not a legal, but a social or ethical issue. Thus Lord Keith regarded it as a question of penal reform.[3] Discussing murder in Scotland, he spoke of 'diminished responsibility' as something less than insanity which reduces the crime to culpable homicide.[4] The M'Naghten rules are not applied there with the same rigour: insanity is determined as an issue by the jury on the evidence of medical witnesses and psychiatrists.

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[16] Whether of physical or mental origin, temporary or permanent, curable or incurable; *per* Devlin, J., in *R.* v. *Kemp* (1956) 40 Cr.App.R. 121 at 128, 129. See *Note* (1957) 73 *L.Q.R.*, pp. 12–13 and J. E. Hall Williams, *Note* (1957) 20 *Mod. L.R.*, pp. 55–7.

[17] [1952] 2 Q.B. 826 at 833, 834. See also *R.* v. *Pugh* [1957] *Crim. L.R.*, pp. 115, 116.

[18] (1952) 86 C.L.R. 358 at 367, 368, upholding the direction of Dixon, J. (as he then was) in *R.* v. *Porter* (1933) 55 C.L.R. 182 at 189, 190.

[19] 216 N.Y. 324 (1915). See his analysis, with the English and American authorities, at pp. 331–40. See also 'What Medecine Can Do for the Law' (1947) *Selected Writings of Benjamin Nathan Cardozo*, p. 380, at p. 385.

[20] 'The Defence of Insanity' (1954) 7 *Current Legal Problems*, p. 16, at pp. 25, 29, 31, 32. See also *The Proof of Guilt*, 1955, p. 104.

[1] See *per* Lord Goddard, C.J., in *R.* v. *Rivett* (1950) 34 Cr.App.R. 87 at 94.

The rejection of the Bill to abolish the death penalty has led to the Government's Homicide Bill for England and Wales, which became law on March 21, 1957. Constructive malice goes (section 1). The death penalty is retained for five limited and closely defined categories of 'capital murder' which strike at the maintenance of law and order, and for repeated murders (sections 5 and 6). For other homicide the punishment will be imprisonment for life (sections 7 and 9). The Scottish doctrine of diminished responsibility is 'adopted and adapted': there is a new defence of 'such abnormality of mind,' inherent or induced, 'as substantially impaired (his) mental responsibility' (section 2). Thus the M'Naghten rules, not formally abolished, will probably fall into desuetude. Provocation by words alone (following the Royal Commission), may henceforth justify a verdict of manslaughter—provided the provocation would make 'a reasonable man' act as the prisoner did.[5] The Act affirms the *Holmes* test applied in *Bedder's* case: would a reasonable man be driven to the loss of self-control to the degree, method and continuance of the violence which produced the death?[6]

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[2] See n. 7 above.

[3] *Parl. Deb., Official Report,* House of Lords, Vol. 198, cols. 643–5.

[4] See *The United Kingdom: The Development of its Laws and Constitutions,* Volume on *Scotland* by T. B. Smith, 1955, pp. 719, 721, 729, 730, citing the directions on diminished responsibility by Lord Alness in *R.* v. *Savage* (1923) J.C. 49 at 50, 51 and by Lord Normand in *R.* v. *Kirkwood* (1939) J.C. 36 at 40, 41.

[5] See Attorney-General's speech, *Parl. Deb., Official Report,* House of Commons, November 15, 1956, Vol. 560, col. 1255, and his citations from the Report of the Royal Commission. *Per contra,* Sir Lionel Heald, *ibid.,* cols. 1194, 1195.

[6] *Bedder* v. *Director of Public Prosecutions* (1954) 38 Cr.App.R. 133 at 141. See Cmd. 8932, paras. 143, 145, and generally, on *Provocation,* paras. 124–53 and, on *Words as Provocation,* paras. 146–50. And see Sir Patrick Devlin, *Trial by Jury,* 1956, pp. 86, 87 and his comment on *Holmes's* case [1946] A.C. 588 at 597 *per* Viscount Simon.

Laudable though the Act be, as an attempt to reform the law, and though it does not in terms attempt the impossible by distinguishing different types of murder, will not this be its effect? In the debate on the Criminal Justice Bill, 1948, Lord Goddard could not see why killing a policeman to avoid arrest should be capital murder, and battering out the brains of a sick or ailing wife should be non-capital. Will not the operation of this measure give rise to anomalies and a new corpus of casuistry? [6a]

### 2. NATURE OF OFFENCES

Since 1951—a 'peak year'—crime has fallen by 21 per cent.[7] In 1938, 1,583 persons were convicted for violence against the person; in 1948 the figure had risen to 3,183; the rise has since been progressive and in 1954 the number was 4,584. The figure for 1955 is 4,958.[8] Other crime appears to come in waves: a wave of lead-stealing after the war and, latterly, a wave of shop-lifting. To cope with the one, Lord Goddard applied sharp, condign punishment; he has suggested the same remedy for the other. To curb the motorist's excess, Viscount Kilmuir, L.C., told the Lancashire magistrates to invoke the dreaded weapon of disqualification.

Two decisions affecting the nature of offences are juristically noteworthy. Each in some measure may be regarded as symptomatic of liberal interpretation and progressive outlook and may affect the development of the law.

In the *Pottery* case [9] the Court of Criminal Appeal said that the safe course was no longer to follow *Manley* which established the misdemeanour of committing an act tending to the public mischief.[10] The right approach to Public Mischief was to regard it as part of the law of conspiracy: 'It surely is now the province of the legislature and not of the judiciary to create new criminal offences,' in Lord Goddard's words.[10a] An editorial note in the *Law Quarterly Review* observes—

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[6a] *Cf.* the speeches of the Lord Chancellor (Viscount Kilmuir), Viscount Samuel, Lord Goddard and Lord Chorley during the Second Reading of the Bill in the House of Lords (February 21, 1957: *Parl. Deb., Official Report,* House of Lords, Vol. 201, cols. 1163–1182, 1184–1240). The House of Lords went into Committee on March 7, 1957, when unsuccessful attempts were made to amend the Bill (*ibid.,* Vol. 202, cols. 353–432).

[7] The figures quoted are cited by Lord Goddard in his speech on the Death Penalty (Abolition) Bill, 1956: *Parl. Deb., Official Report,* House of Lords, July 10, 1956, Vol. 198, col. 740.

[8] Cmd. 9884—1956, p. ix. 68,438 persons were found guilty of larceny (67,052 in 1954); 5,408 of sexual offences (5,133 in 1954); 4,366 of receiving (4,216 in 1954).

[9] *R.* v. *Newland* (1953) 37 Cr.App.R. 154; [1954] 1 Q.B. 158 at 167, 168, referring to Stephen, *History of the Criminal Law,* Vol. 3, p. 359 and the criticism of Stallybrass, 'Public Mischief' (1933) 49 *L.Q.R.,* pp. 183–91.

[10] *R.* v. *Manley* (1933) 1 K.B. 529.

> 'The Court of Criminal Appeal has therefore reached the highly satisfactory conclusion that, although the much criticised *Manley* case is binding on it, it must no longer be followed.'[11]

Lord Goddard's pronouncement in *Taylor's* case[12] may prove a landmark in the law of criminal appeal. The court did not follow the previous decision of the Court of Criminal Appeal in bigamy,[13] but held that, however many times the ceremony of marriage had been gone through, absence for seven years without knowledge of the spouse being alive, was a defence. The second marriage to be considered under the Statute is not the second marriage chronologically speaking, but the second marriage charged in the indictment. The court, undeterred by the doctrine of precedent, quashed the conviction, though 'a more persistent bigamist it is hardly possible to imagine.' Lord Goddard declared—

> 'This court has to deal with the liberty of the subject and if this court found on reconsideration that, in the opinion of a full court assembled for that purpose, the law had been either misapplied or misunderstood and that as a result a man had been deprived of his liberty, it would be its bounden duty to reconsider the earlier case with a view to determining whether he had been properly convicted.'[14]

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[10a] See *Board of Trade* v. *Owen* [1957] 2 W.L.R. 351 at 366, *per* Lord Tucker, where the House of Lords (affirming the Court of Criminal Appeal) declined to extend the law of conspiracy but held that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here. At p. 365, Lord Tucker cites with approval Holdsworth, *History of English Law*, Vol. III, p. 277: 'Moreover, at all periods of our history, it has been far more difficult to extend the criminal law by a process of judicial decision than any other branch of the law. There has always been a wholesome dread of enlarging its boundaries by anything short of an act of the legislature.'

[11] (1954) 70 *L.Q.R.*, p. 7. See Stallybras, 'Public Mischief' (1948) *The Modern Approach to Criminal Law*, pp. 66–76 (a reprint of the article in the *L.Q.R.*) and Glanville Williams, *Criminal Law*, 1953, § 133, 'The Development of the Common Law,' for a criticism of judicial legislation, and § 168, on Public Mischief.

[12] (1950) 34 Cr.App.R. 138. A court of seven judges.

[13] (1939) 27 Cr.App.R. 35 at 37, *per* Lord Hewart, C.J.

[14] 34 Cr.App.R. 142 at 143.

Is not this a declaration of judicial valour at its highest?[15] Indeed, the decisive trend in criminal justice—whether in the definition of crime, in the rules of evidence or procedure, or in the technique of punishment—seems to be a much stricter regard for the interests of the accused.[16] Some may think that this tendency has gone too far,[17] but once the rigour is relaxed the safeguards of the law have gone. 'Dishonesty is not *per se* a criminal offence.'[18]

## 3. EVIDENCE

The rules of evidence and judicial practice in their interpretation remain the strongest shield of the prisoner. More and more are the striking cases of convictions quashed though guilt is clear. The rules of the game are well in the prisoner's favour and that, indeed, is right; the grant of a power under safeguards, to order a new trial, would restore the balance.

Evidence of similar facts may be admissible in a given case, yet if its prejudicial effect is out of all proportion to its evidential value, it ought to be excluded. 'A closed list' of admissible instances would be an 'error,' but such evidence 'ought not to be dragged in to his [sc., the prisoner's] prejudice without reasonable cause.'[19] Over and above this principle of law there is a second proposition: 'not a rule of law but a rule of judicial practice.'[20] This, says Viscount Simon,

> 'flows from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly

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[15] Nor has Lord Goddard hesitated, on occasion, to concede that a previous judgment went too far, as in *R.* v. *Sims* [1946] K.B. 531 at 537, 31 Cr.App.R. 158 at 164 (the judgment was largely prepared by Denning, J., as he then was), mentioned in *R.* v. *Hall* (1951) 35 Cr.App.R. 167 at 176; or even, that he was in error. See *R.* v. *Dent* (1955) 39 Cr.App.R. 131 at 134 at the termination of the argument.

[16] See *per* Devlin, J., in *R.* v. *Dent, loc. cit.,* at p. 140: 'It would not be surprising if in criminal frauds the law was more careful of the interests of the accused than in civil.'

[17] Glanville Williams, *The Proof of Guilt,* 1955, pp. 15, 254, 257.

[18] *Per* Devlin, J., in *R.* v. *Dent, loc. cit.,* at p. 135. The dictum of Bowen, L.J., in *Edgington* v. *Fitzmaurice* (1889) 29 Ch.D. 459 at 483, does not apply in the law of false pretences. See L. Craymer, 'Intention: Is it An Existing Fact' [1955] *Crim. L.R.,* pp. 556–60, for a report of *Hunt* v. *Battersby* (1920) not considered in *R.* v. *Dent.*

[19] *Harris* v. *Director of Public Prosecutions* (1952) 36 Cr.App.R. 39 at 51, 54, *per* Viscount Simon, reasserting Lord Hershell, L.C.'s principle in *Makin's* case [1894] A.C. 57 at 65.

[20] Citing from Lord du Parcq, delivering the advice of the Judicial Committee, in *Noor Mohamed* v. *R.* [1949] A.C. 182 at 192.

> against the accused. If such a case arose, the judge may intimate to the prosecution that evidence of "similar facts" affecting the accused, though admissible, should not be pressed because its probable effect "would be out of all proportion to its true evidential value."'[1]

Again, the rule of practice whereby the judge, in certain types of case, must warn the jury that it is dangerous to convict without corroboration, now has the force of a rule of law. Even if ample corroboration exists, yet if the judge fails to warn the jury, the conviction will be quashed, unless the court can apply the proviso to section 4 (1).[2] Unsworn evidence cannot be corroborated by unsworn evidence, but the sworn or unsworn evidence of a child may be corroborated by the sworn evidence of another child. Though sworn evidence may be corroborated by the unsworn evidence of a child, the jury should be warned to regard it with particular care.[3]

In cases under the Larceny Act, 1916, the court tends to adopt a more realistic approach than before. Thus, being in possession of stolen goods soon after premises have been broken into, is evidence from which a jury may infer that the possessor is the housebreaker or shopbreaker; if he is, it is inconsistent to find him guilty of receiving, for a man cannot receive from himself.[4]

In *R.* v. *Seymour* the court had laid down the proper direction where a person is charged with stealing or receiving.[5] Since the evidence there was that the prisoner stole the goods, his conviction for receiving was quashed. In *R.* v. *Matthews*[6] the court restated the nice distinctions in the cases where an innocent receipt is followed by a subsequent guilty intent—

> 'If at the time when the property is received, the receipt is innocent, the fact that the receiver changes his mind and

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[1] (1952) 36 Cr.App.R. 55, citing Lord Moulton in *Christie* v. *R.* [1914] A.C. 545 at 559. See for a concise formulation of the rule and for the relevant literature, G. D. Nokes, *An Introduction to Evidence*, 1956, 2nd ed., pp. 101–3.

[2] *Davies* v. *Director of Public Prosecutions* [1954] A.C. 378 at 399, *per* Lord Simonds, L.C.

[3] *R.* v. *Campbell* (1956) 40 Cr.App.R. 95 at 100, 102.

[4] *R.* v. *Loughlin* (1951) 35 Cr.App.R. 69 at 71.

[5] [1954] 1 W.L.R. 678 at 680. No count for stealing being on the indictment, the court could not alter the verdict. Had there been a count of larceny and had the prisoner been acquitted, the Court of Criminal Appeal would have had the power to alter the verdict.

[6] (1949) 34 Cr.App.R. 55 at 58, 59.

> later misappropriates the property does not turn the receipt into a felony, . . . (But) if the original taking is wrongful though not felonious, that is to say, amounts to trespass, and if the taker subsequently appropriates the property, that does amount to felony.'[7]

And finally, in *R.* v. *Garth,*[8] Lord Goddard suggested 'a more accurate direction' in a charge of receiving stolen goods—

> 'If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction.'

Turning to the competence of a wife to give evidence against her husband, the court has again said that she cannot be called except in a limited class of case at common law, of offences against the person, or where a statute specifically provides that she may. Thus, in a 'pretty clear case of larceny,' where his wife was called as a witness against the prisoner, with no protest either by the defence or by the Recorder, the conviction was quashed.[9] After a decree of divorce and even after a decree of nullity where the marriage was voidable only, a wife remains incompetent as a witness in any matter arising during coverture: the principle is 'the necessity of preserving the confidence of the conjugal relation.'[10] Where a former wife was wrongly called, even though the point was not taken at the trial or raised in the grounds of appeal, the conviction was quashed.[11]

Though the judge may admit a confession, he must tell the jury to disregard it unless they find that it is voluntary; the conviction will be quashed if he does not.[12] Where the defence is that after caution, a police inspector came into the room and dictated to a detective constable a confession in the prisoner's name, the prisoner can be cross-examined on his previous convictions. This is an attack not on the evidence, but on conduct outside the evidence: an imputation of perjury and conspiracy is 'an imputation upon the character' of a witness for the prosecution.[13]

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[7] Lord Goddard refers to *R.* v. *Riley* (1853) Dears C.C. 149, the case of the misappropriated sheep, and *Ruse* v. *Read* [1949] 1 K.B. 377, where a bicycle was borrowed or taken under the influence of drink.

[8] (1949) 33 Cr.App.R. 100 at 101, where the Lord Chief Justice said that the rule in *Abramovitch's* case (1914) 11 Cr.App.R. 45 at 49, had often been too favourably stated.

[9] *R.* v. *Boucher* (1952) 36 Cr.App.R. 152 at 153.

[10] Cited in *R.* v. *Algar* (1953) 37 Cr.App.R. 200 at 207, from the judgments of Maule, J., and Tindal, C.J., in *O'Connor* v. *Marjoribanks* (1842) 4 M. & G. 435 at 445.

[11] *R.* v. *Algar* (1953) 37 Cr.App.R. 200 at 208, 209. Lord Goddard's judgment contains a historical account of incompetency. For a concise summary of the whole subject, see Nokes, *op. cit.*, pp. 356–9.

[12] *R.* v. *Bass* (1953) 37 Cr.App.R. 51 at 57, 58. See also Byrne, J.'s observations at p. 59 upon denials by police officers, of collaboration in the making of notes. See Travers Humphreys, 'The Bar as a Profession' [1956] *Crim. L.R.*, p. 297, at p. 300, n. 5: '. . . for my own part I always suspect these confessions . . .'

## 4. NEW CRIMINAL COURTS

### *Courts-Martial Appeals Court*

The Courts-Martial Appeals Court, established by the Courts-Martial (Appeals) Act, 1951, follows the practice and principles of the Court of Criminal Appeal in granting leave to appeal.[14] The only difference is that the Court of Criminal Appeal can deal with sentence, whereas the Courts-Martial Appeals Court deals with conviction only.[15] The courts-martial, composed of officers, is analogous to the jury. An appeal is not a rehearing, but where the substantial ground of appeal is that the finding was unreasonable and cannot be supported having regard to the evidence, the court will investigate the evidence.[16] Whoever the victim was and wherever the crime was committed, a British subject can be tried and punished for murder by an English criminal court, or, if he is subject to military law, by a court-martial abroad.[17] 'The King's Peace' in Coke's definition of murder, merely excepts killing in the course of war and, possibly, rebellion.[18]

A court-martial found murder where an Old Bailey jury, in circumstances of provocation, would have found manslaughter. The law had been meticulously stated and the verdict could not be upset. The Courts-Martial Appeals Court, dismissing the appeal, made a representation upon the sentence to the Secretary of State for War.[19]

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[13] *R.* v. *Clark* (1955) 39 Cr.App.R. 120 at 129, citing the judgment of Channell, J., in *R.* v. *Preston* [1909] 1 K.B. 568 at 575, 576.

[14] *R.* v. *Condon* (1952) 36 Cr.App.R. 130 at 131.

[15] *R.* v. *Houghton* (1952) 36 Cr.App.R. 98 at 100.

[16] *R.* v. *Tucker* (1952) 36 Cr.App.R. 192 at 197, 198, *per* Hilbery, J.

[17] *R.* v. *Page* (1953) 37 Cr.App.R. 189 at 196; in certain cases, the trial must be in the civil courts.

[18] *ibid.*, at p. 193, *per* Lord Goddard, L.C.J., in an illuminating excursus into legal history.

[19] *R.* v. *Renn* [1957] *Crim. L.R.*, p. 47, at p. 48: The Army Council reduced the sentence from ten to two years.

On the duties of the Courts-Martial Appeal Court as a Court of Appeal, see *R.* v. *Linzce* (1956) 40 Cr.App.R. 177 at 179, 180, *per* Lord Goddard, L.C.J.

*New Crown Courts at Liverpool and Manchester*

The Criminal Justice Administration Act, 1956, makes new arrangements for criminal justice in Lancashire by establishing two new Crown Courts, the one at Liverpool and the other at Manchester. The two new Recorders are of equal status. They hold full-time office and try the very heavy calendar of crime—all, save the most serious—that has hitherto gone to Assizes and Sessions. The Queen's Bench Division is thus saved the time of several judges on Circuit. The courts meet eleven times a year and the judge is deemed—when exercising the new statutory jurisdiction—to constitute a court of the High Court. They are unique: they resemble the Central Criminal Court, but the Old Bailey is not a Court of Quarter Sessions and cannot deal with appeals from magistrates' courts or matters under the Criminal Justice Act, 1948.[20]

### 5. PROCEDURE

Several times since the war, trial by newspaper has again endeavoured to raise its head; the Divisional Court has taken a serious view. While a murder trial was pending, a newspaper published allegations about other offences. The proprietor was fined £10,000 and the editor was sentenced to three months' imprisonment.[1] In another case, an experienced reporter, by mistake, reported some evidence which was not in fact given at the trial, but had been given at the magistrates' court. Although the prisoner was acquitted, the proprietor was fined £1,000.[2] 'There cannot be anything of greater consequence,' said Lord Hardwicke, 'than to keep the streams of justice clear and pure. . . .[3] The summary jurisdiction of the court to commit, said Lord Goddard, should only be invoked 'in cases of real and serious moment.' The test of contempt is not whether the author or printer intends that result, but whether the matter complained of is 'calculated to interfere with the course of justice.' A Sunday newspaper published an article alleging that X, who had been arrested and charged and at the date of the article was awaiting trial, was engaged in purveying vice in London. The defence was that the paper did not know of the proceedings, but *mens rea,* it was held, is not a constituent of contempt. 'Trial by Newspaper' is 'a perilous adventure which they undertake at their own risk.' Proprietor, editor and reporter were severally guilty of contempt.[4]

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[20] Lord Goddard, opening the Crown Court of Manchester, *The Times*, October 9, 1956. Mr. Neville Laski, Q.C., is the new Recorder of Liverpool, Sir Basil Nield, Q.C., of Manchester.

[1] *Ex p. Haigh* (1949) 93 S.J. 220.

[2] *R.* v. *Evening Standard* [1954] 1 Q.B. 578. See *per* Lord Goddard, C.J., at p. 584.

[3] *The St. James' Evening Post* case (1742) 2 Atk. 469 at 471.

The consultation by justices with their clerk has several times recently exercised the Divisional Court[5] and Lord Goddard's statement in 1953 is an attempt to guide magistrates when and how they may consult their clerk, and to remove the impression that in the decision the clerk plays a leading part.[6] The problem is inherent in a court of lay justices. A solution might be the extension of the system of stipendiary magistrates with whom lay magistrates would sit.[7] A conviction will not necessarily be quashed if magistrates disregard these directions, but there would be ground for complaint to the Lord Chancellor who has absolute power to remove a magistrate.[8]

The new power under section 29 (1) of the Criminal Justice Act, 1948, enabling justices who have convicted a person over 17, to commit to Sessions for sentence, if they think that, in view of the prisoner's character and antecedents, greater punishment should be inflicted than they have power to impose, has proved of inestimable value.[9] Previously, prisoners who had been convicted and were sent for sentence to sessions, had successfully pleaded *autrefois convict*.[10] But now, a section 29 case is composite: until judgment is given, the hearing is not complete.[11] If, however, the magistrates have tried a case without jurisdiction, sessions cannot sentence.[12] Even where there is power to try, 'serious cases should be dealt with by a superior court.'[13]

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[4] *R.* v. *Odhams Press Ltd.* [1956] 3 W.L.R. 796 at 801, 803. A different position prevails in the United States where the Court has no power to issue citation for contempt against the press: [1955] *Crim. L.R.* pp. 423–5. See *Note* (1957) 73 *L.Q.R.*, pp. 8–11, on the 'occupational risk' of this absolute liability.

[5] The principles were laid down and expounded in the case of *R.* v. *East Kerrier Justices* [1952] 2 Q.B. 719 at 723. See also the case of *R.* v. *Welshpool Justices* [1953] 3 W.L.R. 583 at 585, 586 and *R.* v. *Barry (Glamorgan) Justices* [1953] 1 W.L.R. 1320 at 1322. And cf. *Hobby* v. *Hobby* [1954] 1 W.L.R. 1020 at 1025—a matrimonial case where a retrial was ordered.

[6] November 16, 1953, [1954] *Crim. L.R.*, pp. 44–6.

[7] See Glanville Williams, *The Proof of Guilt,* 1955, pp. 278, 279, 289–93.

[8] *R.* v. *How* [1953] 1 W.L.R. 1480. See *Note,* (1954) 17 *Mod. L.R.*, p. 74.

[9] See, on 'antecedents,' *R.* v. *Vallet* (1950) 34 Crim.App.R. 251 at 254.

[10] *R.* v. *Sheridan* [1937] 1 K.B. 223 at 229, 230, *per* Humphreys, J.; *R.* v. *Grant* (1937) 26 Cr.App.R. 8 at 12.

I pass to say something of some recent decisions of the Court of Criminal Appeal on procedure generally.

The decision, where there are separate charges, whether to allow a joint or a separate trial, is one for the discretion of the trial judge, which, in the absence of 'some overwhelming fact,' will not be overruled by the Court of Criminal Appeal.[14] Thus, in the *Harris* case[15] the House of Lords, although it reversed the decision of the Court of Criminal Appeal, agreed with that court that the trial judge had properly ordered all the charges to be tried together: evidence on the first seven was admissible on the eighth 'to rebut the appearance of innocence which, unexplained, the facts might wear.'[16]

If a well recognised rule of procedure has been infringed, the Court of Criminal Appeal has not hesitated to quash a conviction even where the evidence is overwhelming. The growing tendency to charge conspiracy instead of a specific offence, was not to be encouraged, declared Humphreys, J., in *R.* v. *West and Green*[17]: it was 'an essential feature of the criminal law that an accused should be able to tell from the indictment the precise nature of the charge or charges.' Where a variety of offences is alleged, the prosecution ought to be put on their election and compelled to proceed on a certain number only.[18] A defective indictment the court may amend if amended it can be without injustice.[19] But an amendment charging a different offence from the one originally charged, was invalid and the conviction was quashed.[20]

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[11] *R.* v. *Norfolk Justices* (1950) 34 Cr.App.R. 120 at 128, 129. See *Ex p. Martin* (1952) 36 Cr.App.R. 23: a prisoner must be told, in plain language, before he agrees to be tried summarily, of his liability to be sent to sessions for sentence, otherwise the conviction will be quashed.

[12] *R.* v. *Middlesex Quarter Sessions* (1950) 34 Cr.App.R. 112 at 115, 116.

[13] *R.* v. *Norfolk Justices* (1950) 34 Cr.App.R. 120 at 126. See also *R.* v. *Middlesex Quarter Sessions* (1950) 34 Cr.App.R. 112 at 116. Thus also, charges of blackmail should be dealt with by assizes and not by quarter sessions, unless there is 'some very compelling reason,' *per* Goddard, L.C.J., in *R.* v. *Hacker* [1957] 1 W.L.R. 455.

[14] *R.* v. *Hall* (1951) 35 Cr.App.R. 167 at 172, *per* Lord Goddard, L.C.J. And see *R.* v. *Armstrong* [1957] *Crim. L.R.*, pp. 198–9, where A was indicted together with his wife at assizes for the murder of his five months old child by poisoning. A was convicted; his wife was acquitted. A's appeal was dismissed: the judge's discretion would not be interfered with. The authorities are reviewed in *R.* v. *Grondowski* (1956) 31 Cr.App.R. 116.

[15] (1952) 36 Cr.App.R. 39 at 50, *per* Viscount Simon.

[16] *Per* Lord Sumner, in *Thompson* v. *R.* [1918] A.C. 221 at 232.

[17] (1948) 32 Cr.App.R. 152 at 163, 164.

[18] *R.* v. *Hudson* (1952) 36 Cr.App.R. 94 at 95.

In *R.* v. *Summers* Lord Goddard said that in charging the jury, the phrase 'reasonable doubt' should be avoided.[1] In *R.* v. *Hepworth,* Lord Goddard reconsidered the dicta in *Summers* and restated the mode of directing a jury on the burden of proof.[2] The jury should always be told that the burden is on the prosecution. A jury can be told: 'You must be satisfied beyond reasonable doubt,' or 'You must be completely satisfied' or, 'better still,' 'You must feel sure of the prisoner's guilt.' Something more must be said than merely that they must be 'satisfied.' The onus is on the prosecution all the time, and so they must be told.[3] No form of words is 'sacrosanct.'[4] Where the jury was not specifically directed to acquit if the explanation of accident left them in doubt, a conviction for murder was quashed.[5]

Faith in the jury system was 'an articulate major premise in the Royal Commission's Report.'[6] Juries are not infrequently responsible for contradictory verdicts that would appear to be a compromise,[7] but dispute the weighty criticisms of Professor Glanville Williams,[8] Mr. Justice Devlin's most recent extra-judicial analysis of trial by jury constitutes, with respect, a profound vindication—

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[19] *R.* v. *Smith* (1950) 34 Cr.App.R. 168 at 177, *per* Humphreys, J.

[20] *R.* v. *Jennings* (1949) 33 Cr.App.R. 143 at 149, 150, *per* Humphreys, J.

[1] (1952) 36 Cr.App.R. 14 at 15.

[2] (1955) 39 Cr.App.R. 152 at 154, 155. It is the effect of the summing-up, not the formula, that matters: *per* Lord Goddard, C.J. See also, Nokes, *op. cit.,* p. 440.

[3] *R.* v. *Kritz* [1950] 1 K.B. 82 at 89.

[4] *R.* v. *Blackburn* (1955) 39 Cr.App.R. 84 at 85.

[5] *R.* v. *Murtagh & Kennedy* (1955) 39 Cr.App.R. 72 at 83, 84, *per* Hilbery, J. On the uncertainty of the present law, see Glanville Williams, 'The Direction to the Jury on the Burden of Proof' [1955] *Crim. L.R.,* pp. 464–74. See Maurice Lush, 'Satisfied Beyond Reasonable Doubt—Canadian and Australian Cases' [1957] *Crim. L.R.,* pp. 170–7.

[6] J. E. Hall Williams, 'Trusting the Jury' [1954] *Crim. L.R.,* p. 434, at p. 435, 438, 439. See, generally, *Report of the Royal Commission on Capital Punishment,* Cmd. 5932—1953, and *Note* (1954) 17 *Mod. L.R.,* pp. 57–65.

[7] See *R.* v. *Walhein* (1952) 36 Cr.App.R. 167 at 168, on the need for 'a certain amount of give and take'; *R.* v. *Creasy* (1953) 37 Cr.App.R. 179 at 181, on a 'process of give and take.'

[8] In *The Proof of Guilt,* 1955, pp. 103, 233.

> 'Each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.'[9]

The jury send the Recorder a communication. He answers it from his private room, instead of recalling them and reading out in open court communication and answer. The conviction is quashed.[10] Any communication by the jury and the judge's answer must be read in open court before the verdict is returned.[11] Once a summing up is concluded, no further evidence ought to be given.[12] After a jury had retired they sent a message, saying, Could they go out to lunch? The Recorder gave them permission. The irregularity rendered the trial abortive; the conviction was quashed but since the trial was not a nullity, there could not be a *venire de novo*.[13] 'To deprive an accused of protection given by "essential steps in criminal proceedings,"' said Lord Goddard, 'amounts to a miscarriage of justice and leaves the court no option but to quash the conviction.' Section 35 (4) of the Criminal Justice Act, 1948, now entitles the court, if it thinks fit, at any time before the jury consider their verdict, to permit them to separate.

Some of these difficulties could be met if there were power to order a new trial, which Lord Goddard has powerfully urged.[14]

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[9] Sir Patrick Devlin, *Trial by Jury*, 1956, p. 164. And see Travers Humphreys, 'Do we need a Jury?' [1956] *Crim. L.R.*, pp. 457–60.

[10] *R.* v. *Green* (1949) 34 Cr.App.R. 33, where the jury had found the prisoner guilty of stealing 60,000 yards of cloth, worth £7,000, and the conviction was 'amply justified.'

[11] *R.* v. *Furlong* (1950) 34 Cr.App.R. 79 at 83, 84. Question and answer were read out after verdict but before sentence. The conviction, in the circumstances of that case, was not quashed; *R.* v. *Ion* (1950) 34 Cr.App.R. 152 at 155, 156, *per* Humphreys, J.

[12] *R.* v. *Owen* (1952) 36 Cr.App.R. 16 at 19, 22, *per* Lord Goddard, C.J.

[13] *R.* v. *Neal* (1949) 33 Cr.App.R. 189 at 192, citing Lord Sumner's phrase in *Crane* v. *Director of Public Prosecutions* [1921] 2 A.C. 299 at 331, and following *R.* v. *Ketteridge* [1915] 1 K.B. 467.

[14] The Tucker Committee (Lord Tucker, Humphreys, J., and Judge Bass dissenting), recommended this power where the ground was based on fresh evidence. The power should not be exercised in respect of a count

In recent years the Home Secretary has several times used his power to refer a case to the Court of Criminal Appeal under section 19 (a) of the Act. The court is not bound by the ordinary rule of practice relating to appeals, not to receive fresh evidence unless it is shown that the evidence could not have been produced at the trial or that some unforeseen point arose. Each case must be treated on its own merits. The court will not regard itself as bound by the rule of practice if to do so might lead to injustice or the appearance of injustice.[15] The court will consider only the grounds on which the case was referred, and no other.[16]

## 6. PUNISHMENT

### (a) *General Principles*

The Criminal Justice Act, 1948, besides introducing corrective training and widening the ambit of preventive detention, has changed the technique of punishment. The emphasis is upon reformation; deterrence is first equal, or a close second. During the first seven years of the Act, the Court of Criminal Appeal, besides restating the general principles of sentence, has given judicial form to the new modes of punishment. There is a two-way movement: towards greater leniency, yet also, in a proper case, towards greater severity.

Only when a sentence appears to err in principle, said Hilbery, J., in *R.* v. *Ball*, will the court alter it: if it is excessive or inadequate through failure to apply the right principles. The court, he said, should always be guided by certain considerations. First and foremost is 'the public interest.'

> 'The criminal law is publicly enforced not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that if the offender is caught, and brought to

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on which the accused was acquitted (Cmd. 9150—1954). See [1954] *Crim. L.R.*, p. 573; *R.* v. *Melvin* (1953) 37 Cr.App.R. 1 at 5, 6. The jury, finding the prisoner not guilty of larceny but guilty of receiving, the Court of Criminal Appeal reluctantly quashed the conviction but were unable to substitute a verdict of guilty of larceny. They would have ordered a new trial, had they power to do so.

[15] *R.* v. *Sparks* (1956) 40 Cr.App.R. 83 at 92, *per* Donovan, J. The Court of Criminal Appeal admitted new evidence in *R.* v. *McGrath* [1949] 2 All E.R. 498 and in *R.* v. *Collins* (1950) 34 Cr.App.R. 146.

[16] *R.* v. *Caborn-Waterford* (1956) 40 Cr.App.R. 110.

> judgment, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is served and indeed best served, if the offender is induced to turn from criminal ways to honest living. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide when to be lenient or severe.'[17]

The sentence should be commensurate with the gravity of the offence, no account taken of remission which is a prospect but not a right.[18] A person under 21 must not be sentenced to imprisonment unless the court—looking at the matter with common sense—thinks no other method appropriate.[19]

There is a tendency to give the defence more information before the trial and to make sure that the antecedent history of convicted persons given to the court is based upon knowledge. The judges of the Queen's Bench Division recently issued a *Practice Notice* on '*Antecedent History.*'[1]

Lord Goddard recently told the Annual Meeting of the Magistrates' Association that, in his opinion, sessions should not interfere with sentences 'except for really good reasons' and these should be stated.[2] He expressed surprise 'at how frequently shoplifting cases, in which the magistrates have taken a severe line and have passed sentences of imprisonment, are being interfered with.' Shoplifters often get off with a fine: each year one million pounds worth of goods are lost through shoplifting in the West End. 'Heavy sentences,' he continued, 'in themselves are not a cure for crime, but there is no doubt that where a particular kind of crime is prevalent, sharp sentences do have a very marked effect upon it.'[3] The Court of Criminal Appeal used to be 'too prone to reduce sentences,' but now it seldom interferes 'except on some ground of principle or because we have had submitted to us facts which were not before the court below.'

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[17] (1951) 35 Cr.App.R. 164 at 165, 166. Thus in *R.* v. *French* (1955) 39 Cr.App.R. 192 at 194, a sentence of 4 years' imprisonment was reduced to 2 years for attempted suicide, not, in point of law, a very serious crime, said Lord Goddard. In *R.* v. *Richard* (1955) 39 Cr.App.R. 191 at 192, where a mother and daughter were convicted of obtaining by false pretences and the court had sentenced the mother to 2 years and the daughter to 4 years, the Court of Criminal Appeal, through the disparity, reduced the daughter's sentence to one of 3 years. And see H. Palmes, 'Principles of Punishment' [1957] *Crim. L.R.*, pp. 155–9.

[18] *R.* v. *Maguire* (1956) 40 Cr.App.R. 92 at 94.

[19] Criminal Justice Act, 1948, subs. 17 (2). In *R.* v. *Chambers* (1952) 36 Cr.App.R. 104, the Court of Criminal Appeal substituted 3 years' imprisonment for 3 years' Borstal upon a member of a lead-stealing gang.

[1] (1955) 39 Cr.App.R. 20 at 21.

[2] *The Times,* October 19, 1956.

The maximum sentence of imprisonment, it used to be thought, was two years, but in *R.* v. *Morris*,[4] the Court of Criminal Appeal held that the law is and always has been that, for a common law misdemeanour a court can sentence to imprisonment and fine, provided that the sentence is not inordinate. Thus, a sentence of four years was passed for a conspiracy to evade customs and duty on 10,000 watches. The judgment contains an historical excursus on imprisonment. Long before 1948 prison discipline had become less rigorous; there was little difference between imprisonment with hard labour and imprisonment without, and none between imprisonment and penal servitude. The Criminal Justice Act, 1948, had abolished penal servitude and imprisonment with hard labour and had substituted imprisonment. The reasons inducing courts to confine imprisonment to two years had therefore disappeared.[5]

### (b) *New Forms of Punishment*

Any court may now, in lieu of or in addition to any other sentence, impose a *fine* on conviction for any felony the sentence for which is not fixed by law. Before 1948, this could only be done in manslaughter or in summary convictions under the Larceny Act. A heavy fine is only appropriate where Parliament has so provided, especially in fraudulent practices where the object of the prosecution is largely to prevent the offender from obtaining financial benefit.[6]

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[3] See *R.* v. *Higgs, The Times,* October 23, 1956, where the Court of Criminal Appeal increased a sentence of 3 years' imprisonment to one of 5 years, where a woman of thirty-seven admitted stealing £4,000 worth of jewellery from houses where she had obtained employment as a domestic servant. In *R.* v. *Chambers* (1952) 36 Cr.App.R. 104 at 105, Lord Goddard referred to the offence of obtaining money from Post Offices after the war by forged documents, where the court laid down a minimum sentence of 3 years. In *R.* v. *Crabtree* (1952) 36 Cr.App.R. 161, since the prisoner had not had any long sentence, a sentence of 9 years' imprisonment for receiving stolen lead, knowing it to have been stolen, was reduced, with hesitation, to 7 years.

See also Lord Goddard's comments upon the increase of the offence of snatching money from messengers, which had not been 'sufficiently seriously dealt with previously': *R.* v. *Butt, The Times,* February 5, 1957.

[4] (1951) 34 Cr.App.R. 210 at 214, 215.

[5] See *R.* v. *Higgins* (1951) 35 Cr.App.R. 131 at 134: sentences over 2 years should only be imposed in serious crime or where, if the offence was an attempt and if the attempt had succeeded, a severe sentence would have been imposed. In *R.* v. *Bryan* (1951) 35 Cr.App.R. 121 at 122, the Court of Criminal Appeal refused to disturb a 10 years' sentence on the leader of a gang of thieves that stole from safes by means of duplicate keys—'a particularly dangerous and insidious form of crime.'

*A fine*—a punishment with the possibility of imprisonment in default—cannot be imposed with a probation order, though a probation order may be accompanied by a compensation order.[7] A person cannot now be kept in custody until a fine is paid. The court can allow time or make an instalment order or make an order for imprisonment if the sum is not paid.[8]

'*Probation* developed from the suspension of punishment, subject to good behaviour, into the present conception of it as a combination of the conditional suspension of punishment and the personal supervision of the released offender during a trial period.'[9] A probation order must be explained to the defendant in ordinary language. He must be told that if he fails to comply with the conditions, he may be sentenced for the original offence. The common condition, that the defendant 'lead an honest and industrious life' gave way in 1952 to one more precise: 'to be of good behaviour and keep the peace.'[10] A conviction followed by a probation order does not rank as a conviction for the purposes of corrective training or preventive detention—even if the offender breaks his recognisances—unless sentence is later imposed for failure to comply with the probation order or there has been a further offence.[11]

*Corrective Training* serves two purposes: the reformation of the offender and the prevention of crime. Its duration is from two to four years, and it is imposed on a person over 21 years who has committed an offence for which the maximum sentence is at least two years. He must also have been twice previously convicted since he was 17 of offences for which the sentence on indictment for each offence is at least two years. Corrective training is now not normally passed on a man over 30.[12] It is an extension of the Borstal principle.[13] Before passing a sentence of corrective training or preventive detention, the court has a duty, beyond satisfying itself that the statutory conditions are fulfilled, and that the Prison Commissioners have reported that the prisoner is physically and mentally fit and suitable for such a sentence. The court must further weigh up all the facts and circumstances of the case and then decide what sentence is appropriate. Not less than three years should be imposed. A two years' sentence is inappropriate ; for, with remission, that would mean one year and four months only. Three years mean two—the least sentence likely to be of use.[14] The training is held under conditions different from those of ordinary punishment. When the prisoner comes out, he comes under the charge of the After-Care Association whose function is to find him work, to lend a helping hand and to keep him under observation.[15] Neither corrective training nor preventive detention should be imposed in face of a report by the Prison Commissioners that the offender is unsuitable.[16] Corrective training can be imposed to follow imprisonment,[17] but imprisonment must not be imposed to follow corrective training.[18] When a prisoner, on licence from corrective training, commits an offence, imprisonment (subject to the report of the Prison Commissioners) is the right sentence.[19]

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[6] Criminal Justice Act, 1948, s. 13. In *R.* v. *Marwick* (1953) 37 Cr.App.R. 125 at 126, a £500 fine for larceny from a fellow member of a club was varied, as being wrong in principle, to a sentence of imprisonment.

[7] *R.* v. *Parry* (1951) 34 Cr.App.R. 224 at 230; *R.* v. *McClelland* (1951) 35 Cr.App.R. 22 at 23.

[8] Criminal Justice Act, 1948, s. 14 (1) introduced new law. See Lord Goddard's historical review in *R.* v. *Brook* (1949) 33 Cr.App.R. 92 at 93, 96, 97.

[9] T. E. James, 'Punishment and Treatment since 1948' [1954] *Crim. L.R.*, p. 687, at p. 691.

[10] Statement of Lord Goddard (1952) 35 Cr.App.R. 207 at 209.

[11] Criminal Justice Act, 1948, s. 12 (1). See *R.* v. *Stobbart* (1951) 35 Cr.App.R. 125 at 127. In *R.* v. *Wall and Rowlands* (*The Times*, March 4, 1957), the Court of Criminal Appeal expressed disapproval of suspended sentences.

In *R.* v. *McCarthy*[20] a man of 28 had three previous convictions for larceny. He had been on probation for three years; a few months later he was charged with stealing a shirt and trousers and, pleading guilty, was sentenced to three years' corrective training for the larceny and the breach of the probation order, concurrently. The Court of Criminal Appeal substituted eighteen months' imprisonment, Devlin, J., saying that corrective training was in substance a form of imprisonment and eighteen months would have been about the right pre-1948 sentence for this offence.[1]

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[12] *R.* v. *Boucher* (1952) 36 Cr.App.R. 152 at 154.

[13] *R.* v. *Apicella* (1949) 34 Cr.App.R. 29 at 31, 32. See *per* Birkett, L.J.

[14] *R.* v. *Grant* (1951) 34 Cr.App.R. 230 at 235.

[15] *R.* v. *Ledger* (1950) 34 Cr.App.R. 117 at 118, 119.

[16] *R.* v. *Murray* (1951) 34 Cr.App.R. 203 at 209. Where the prisoner had a long list of convictions, 7 or 8 years' preventive detention would have been justified, said Lord Goddard. The conviction was quashed on the ground of a complete misdirection on a point of law. See also *R.* v. *Churchill* [1952] 2 Q.B. 637 at 640, and *R.* v. *Shepherd* (1951) 34 Cr.App.R. 236 at 237, 238.

[17] *R.* v. *Cannell* [1954] *Crim. L.R.*, p. 64.

[18] *R.* v. *Talbot* [1953] 1 Q.B. 613 at 615, following the unreported decision of *R.* v. *Meaney*, *ibid.*, p. 614, n. 5.

[19] *R.* v. *Wilsher* [1953] 1 W.L.R. 844.

[20] (1955) 39 Cr.App.R. 118 at 119.

*Preventive Detention* is for the hardened recidivist.[2] The prisoner must be not less than 30; he must have been convicted on indictment of an offence punishable with two years' imprisonment; he must have had three previous convictions since he was 17 for offences, each carrying at least two years' imprisonment, and on two of these he must have been sentenced to Borstal, imprisonment or corrective training. The period of such detention may be from five to fourteen years.[3] In *R.* v. *Barrett*[4] the court declared that it was not a substitute for penal servitude, nor is it to be passed merely instead of imprisonment. An 'exceptional sentence,' it should be imposed only when the prisoner is an habitual criminal (in the non-technical sense), and only when a prolonged detention is necessary for the protection of the public.[5]

These principles were amplified in *R.* v. *Sedgwick*.[6] Except in the case of an old man—whom the court does not desire should spend his last days in prison—five years is not appropriate: seven is the 'irreducible minimum' but the sentence should generally be for eight years or longer. Where a man of 46 with twenty previous convictions who had pleaded guilty to housebreaking, had asked for twenty-two other offences to be taken into consideration, and was sentenced to eight years preventive detention, Lord Goddard said that anything up to twelve years would not have been wrong.[7] The time for punishment has gone by: 'it has become a matter of putting a man where he can no longer prey upon society, even though his deprivations may be of comparatively small character . . .'[8]

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[1] At 72 *L.Q.R.* (1956), pp. 117–22, Dr. J. Ll. J. Edwards regards the case as laying down a new doctrine—and a dubious one—in criminal punishment. But it does not, with respect, appear to lay down any new doctrine.

[2] On definitions, causes and treatment of 'recidivists'—'the stage army of recidivists who cross and recross the prison gates,' see Jean Graham Hall in [1955] *Crim. L.R.*, pp. 685–9.

[3] See Criminal Justices Act, 1948, s. 21 (2).

[4] (1949) 34 Cr.App.R. 3 at 5, 6, 8.

[5] *Statement on Preventive Detention, ibid.*, pp. 7, 8.

[6] (1950) 34 Cr.App.R. 156. In *R.* v. *Kinally* (1950) 34 Cr.App.R. 163 at 166, these principles were repeated. The Court of Criminal Appeal here substituted 5 years' imprisonment upon a man of thirty-nine with 11 convictions. Though 8 years is the minimum normal sentence except in the case of an old person or 'for some special reason,' 'that does not mean that every time a prisoner is qualified for preventive detention, he should be sentenced to 8 years'—*R.* v. *Gentry* (1955) 39 Cr.App.R. 195 at 197.

## 7. CONCLUSION

Imprisonment, corrective training, preventive detention, how far do they achieve their object?

At the annual conference of the Prison Officers' Association, prisons, it was said, were 'simply becoming universities for the furtherance of criminal education.'[9] Prisons built for one man in a cell now house two or more. To the short sentence some alternative is clearly necessary, the Howard League maintains; other necessities are small prisons and the segregation and treatment of difficult and abnormal prisoners in a special psychiatric prison.[10] 4,000 people go to prison every year for civil offences. In Scotland a man's wages are attached, but although the Royal Commission does not recommend the method, Lord Mancroft thought it should be reconsidered.[11]

The debate in the House of Lords on July 31, 1956, on *Prisons and After-Care*[12] illumines in all its starkness the problem of punishment and shows how, even with the new techniques and with enlightened prison Commissioners, we are only at the beginning of the road. Why are the prisons twice as full today as they were in 1939? Should not the first offender, as far as possible, be kept out of prison?[13] 70 per cent of persistent offenders were first convicted before the age of 21.[14]

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[7] *R.* v. *Love* [1954] *Crim. L.R.*, p. 66.

[8] *R.* v. *Churchill* [1952] 2 Q.B. 637; 34 Cr.App.R. 107 at 111, 112. Five years' imprisonment was substituted for five years' preventive detention where the prisoner's record began in 1939 and there were 19 offences.

[9] *The Times*, May 31, 1956.

[10] *The Times*, October 8, 1956. Psychiatric treatment is already available at Wormwood Scrubs, Wakefield and Holloway: [1954] *Crim. L.R.*, p. 441.

[11] *The Times*, October 19, 1956. See also *Parl. Deb., Official Report*, House of Lords, Vol. 199, col. 475.

[12] *ibid.*, cols. 426–88.

[13] *ibid.*, cols. 426–36.

The devotion of the Home Office to the whole nexus of these problems—as evidenced in Lord Mancroft's speech[15]—is the most gratifying trend in criminal justice today. 2,000 people still do not have a cell to themselves; in 1955, the number was 3,000.[16] Much criticism of the hygiene is justified. Prison staffs have doubled but the establishment is very short. In training prisons and in open prisons the relationship between prisoner and prison officers is good[17]; in local prisons it is otherwise. Stitching mailbags, apparently, is not the exclusive occupation. Bristol experimented in permitting third stage preventive detention men to work in the city and receive normal wages, and rules are to be laid before Parliament to extend the practice.[18] New attention is to be paid to the rehabilitation of prisoners—beginning from sentence and ending with after care.

The Annual Report for 1955 of the Council of the Central After-Care Association exhibits new trends in after-care. Home leave before discharge is given not only to Borstal inmates but to prisoners serving three years or more in regional training prisons and to 'Star' prisoners (first offenders), similarly serving in central prisons. Fewer have been sent to corrective training; more to preventive detention and to long terms of imprisonment.[19] Of the first 250 men returned from preventive detention, 154 had been reconvicted, half of whom were given new sentences of preventive detention. The date of release depends on the decision of the Preventive Detention Advisory Board which reviews each case one year before the man has served two-thirds of his sentence. The purpose of the Association set up in 1949 was to meet the requirements of the Criminal Justice Act, 1948, which had increased the categories of offenders who are released under licence and require positive supervision and after-care. All the existing after-care associations were merged into one body acting on common principles. This Central Association, financed from public funds, is under voluntary management.[20]

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[14] See Dr. R. Radzinowicz, 'The Persistent Offender' (1948) *The Modern Approach to Criminal Law,* p. 173, n. 2. See also F. J. Odgers, 'Prevention of Juvenile Crime' [1955] *Crim. L.R.*, pp. 173–5.

[15] *Parl. Deb., Official Report,* House of Lords, Vol. 199, cols. 473–88. And see the debate in the House of Commons on *Prisons,* and the speech of the Home Secretary (Mr. R. A. Butler, M.P.) on the conception of punishment (*Parl. Deb., Official Report,* House of Commons, March 13, 1957, Vol. 566, cols. 1142–1208, at cols. 1143–57).

[16] *ibid.*, col. 476.

[17] See Rex Cowan, 'Open Prisons and Borstals' [1955] *Crim. L.R.*, pp. 169–72.

[18] *loc. cit.* in note 15 above, cols. 481, 482.

[19] In December 1955, 957 were undergoing corrective training and 1,201 serving preventive detention (p. 5, para. 4).

'Every offender offers hope of reclamation'[1] is the optimistic principle to which, in deed, this Association subscribes.

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[20] *Historical Note, ibid.*, pp. 28–31.

[1] *ibid.*, p. 13, Clause 11 of the 'Declaration of Principles' adopted in 1954 by the International Prisoners' Aid Association.

# 8

# THE REFORM
# OF
# THE SETTLED LAND ACT, 1925

ERNEST H. SCAMELL

IT is now more than thirty years since the Property Legislation of 1925 came into operation and apart from certain initial teething troubles which were, for the most part, cleared up by the Law of Property (Amendment) Act, 1926,[1] this legislation has, on the whole, worked remarkably well. Since January 1, 1956, however, positive signs of wear have become apparent, though I hasten to add that such wear is for the most part localised rather than general in character. As an example, section 44 subsections (1) and (8) of the Law of Property Act, 1925, provide that under an open contract a purchaser of land may require a root of title thirty years old and shall not be deemed to be or ever to have been affected with notice of any matter or thing which only an investigation of title prior to such a root of title would disclose unless he actually makes such investigation or inquiries. Prima facie, therefore, a purchaser who investigates his vendor's title back to a root of title at least thirty years old is not affected with notice of anything affecting the title which arose prior to such root and was not discovered by the purchaser in the course of his investigation. But section 198 (1) of the same Act provides that the registration of any instrument or matter under the provisions of the Land Charges Act, 1925, shall be deemed to constitute actual notice of such instrument or matter. Now until January 1, 1956, no problem arose since all instruments or matters registered under the Land Charges Act, 1925, were necessarily so registered within the period of thirty years during which a purchaser was bound to investigate title. Since January 1, 1956, however, there is a clear conflict between the provisions of section 44 (8) and section 198 (1) of the Law of Property Act, 1925, since under the former section a purchaser is not affected with notice of an incumbrance arising prior to a root of title thirty years old whereas by virtue of the latter section he is deemed to have actual notice of all properly registered incumbrances even though they were registered prior to the date of such root of title; but there is little doubt that section 198 (1) must prevail over section 44 (8),[2] so that instruments and matters which are registered will bind a purchaser independently of the thirty year period. If this is so, then clearly unless the law is amended, the purchaser's task of investigating title, which it was the avowed object of the framers of the Property Legislation to simplify, will become progressively more onerous as time goes on since the only way a purchaser can adequately protect himself is by stipulating for a root of title commencing not later than January 1, 1956.[3]

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[1] See also the Law of Property (Amendment) Act, 1929, and the Law of Property (Entailed Interests) Act, 1932.

This problem is, of course, not directly connected with the Settled Land Act, 1925, but I mention it in order to suggest that the present is perhaps an opportune time for considering or reconsidering the case for the reform of the Settled Land Act, forming, as it does, part of the same legislation as the Law of Property Act, 1925, and also because it so happens that this particular problem is not without its parallel in the Settled Land Act itself. The parallel problem arises in connection with the proviso to section 110 (2) of the Act which provides that as regards a first vesting instrument executed for the purpose of giving effect to a pre-1926 settlement or to a settlement created informally (*i.e.*, otherwise than by a proper trust instrument) a purchaser shall be concerned to satisfy himself that the land is settled land, that the person in whom the settled land is by such vesting instrument vested is the person in whom it ought to be vested as tenant for life or statutory owner, and that the persons thereby stated to be the trustees of the settlement are the properly constituted trustees. It is not entirely clear, but it would appear that a purchaser is bound to satisfy himself as to the three last-mentioned requirements *whenever* the first vesting instrument was executed and accordingly, in order to be absolutely safe, a purchaser of settled land or of land which was formerly settled land should, in the appropriate cases, stipulate that the root of title should be the first vesting instrument executed to give effect to the settlement even though such root might be older than the thirty year root to which alone a purchaser would be entitled under an open contract. Here again, therefore, the 'conveyancing' provisions of the Property Legislation appear to be showing signs of their age.

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[2] See *Re Cox and Neve's Contract* [1891] 2 Ch. 109; *White* v. *Bijou Mansions Ltd.* [1937] Ch. 610.

[3] See further, the Report of the Committee on Land Charges, Cmd. 9825.

Having thus commenced on a somewhat technical note, I hasten to reassure you that my main object is not to present a list of sections and subsections and then point out all or even some of their technical shortcomings, but to consider, on more general lines, the mischief which the Act sought to remedy and the extent to which it has accomplished its purpose.

## HISTORICAL BACKGROUND TO THE ACT

Briefly, the object of the Settled Land Act, 1925, was to simplify the means by which settled land could be disposed of as a commercial asset whilst at the same time affording adequate protection to the beneficiaries entitled under the settlement. The measure of success achieved by the Act must therefore be gauged by reference to the nicety with which these somewhat contradictory objects have been balanced.

Historically, there are two types of settlement—the strict settlement the object of which was that the settled property should be enjoyed *in specie* by the beneficiaries, and the trust for sale which has been aptly designated as the trader's settlement since its object was not to secure that any specific property should be enjoyed but rather that funds of a certain value should be enjoyed. The object of the strict settlement was thus to keep the settled land in the family and to prevent, as far as possible, its alienation, whilst in the case of the trust for sale, the alienation of the property held in trust, far from being prevented, was, at any rate in theory, the primary object of the trust. This difference in approach to alienability between the two types of settlement explains why the strict settlement alone has been constantly reformed both by the courts and by the legislature whilst the trust for sale has, for the most part, been left to its own devices.

Passing over the uncertainties of the Anglo-Saxon period, the first post-Conquest species of settlement consisted in the limitation of an estate 'to A and the heirs of his body.' At first, the courts construed such a limitation strictly so that only the grantee and his lineal heirs could inherit and no one had power to dispose of any interest in the land which would continue after his death. The opportunity thus presented for tying up land was immediately seized by the great landed proprietors since they saw in it the means of transmitting their power and splendour to posterity and the result was that a good deal of land was taken outside the ken of commercial dealing. A method of alleviating the position was, however, soon found by the courts who proceeded to construe a limitation 'to A and the heirs of his body' as a fee simple conditional, *i.e.*, a fee simple subject to a condition precedent of A having issue. Birth of issue to A thus satisfied the condition and made the fee simple estate freely alienable. For a time this was accepted, but its effects mitigated by the method of limiting the land to A for life with a vested remainder to his eldest son and the heirs of his body and subject thereto to his second and other sons in like manner with an ultimate remainder to the grantor. By this means the land was tied up for at least one generation. But this hardly satisfied the ambition of the great landed families whose desire was to create *perpetual* rights of succession and they therefore procured the passing of the celebrated statute *De Donis Conditionalibus*[4] in 1285 the effect of which was to restore the original construction placed upon a grant 'to A and the heirs of his body' so that, come what may, the land would descend to the grantee's lineal heirs *ad infinitum*. There seems little doubt that had the statute succeeded for long, the whole community would have fallen into a state of abject dependence upon a few powerful individuals, for the landed wealth in the country was tending to become increasingly and irrevocably concentrated in the hands of a few. The courts, however, again found a way of setting the land free and eventually permitted a tenant in tail to bar the entail and dispose of the fee simple estate in the land by suffering a common recovery. This right to bar was recognised at least as early as 1472 when the famous *Taltarum's* case[5] was decided but it probably existed a good deal earlier. In any event the effect of it was to deal a death blow to inalienability and to this part of the statute *De Donis*.

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[4] Statute of Westminster II 13 Ed. 1 Ch. 1.

[5] (1472) Y.B. 12 Ed. 4 Mich. pl. 25. For a full account, see Challis, *Real Property* (3rd ed. 1911), pp. 309 *et seq.*, and see also H. W. Elphinstone's 'Notes on the Alienation of Estates Tail' (1890) 6 *L.Q.R.*, p. 180.

The next important stage in the development of settlements took place after, and seemingly as a direct result of, the Statute of Uses, 1535. Whilst after the decision in *Sambach* v. *Dalston*[6] it is true to say that this statute had failed in all its intended objects, it became and, until 1926, remained of supreme importance in the law of real property because of its unintended or incidental consequences; in particular, it formed the foundation stone of the 'modern' settlement. I have mentioned that by means of the device of the common recovery a tenant in tail was enabled to dispose of the fee simple even though such estate was not actually vested in him. In addition a statute passed in 1540[7] authorised tenants in tail and husbands seized in right of 7 their wives to make leases for twenty-one years or for three lives which would be binding upon the tenant in tail's successors in title. Apart from these two instances, however, the general rule of the common law was that apart from the doctrine of agency, no one could dispose of any greater interest in property than the interest vested in him: *Nemo dat quod non habet.* Powers divorced from ownership were unknown. It was otherwise in equity, however, where, before the Statute of Uses, a limitation of land 'to X and Y and their heirs to the use of A for life and subject thereto to such uses as A should by deed appoint' vested a perfectly valid power in A to dispose of the equitable fee simple although his beneficial interest was for his life only. After the Statute of Uses, not only A's life interest but also the power to dispose of the fee simple took effect at law since the statute 'executed' uses. Here, therefore, was a means by which land could be limited for the benefit of persons in succession with power conferred upon each of such persons successively to sell or grant leases of the land, provision being made for the proceeds of sale and the income derived from the investments representing the same to be held upon the same limitations as those upon which the land had been held. In this way adequate provision could be made for members of the settlor's family without causing any such public inconvenience as resulted where settled land was inalienable. Whilst, however, it became *possible* for settlors to confer powers of alienation on the owners of limited interests, they were at first reluctant to do so. In the collection of Select

[6] (1634) Tothill 188.

[7] 32 Hen. 8, c. 28.

Precedents attributed to Sir Orlando Bridgman and published in 1682, the only cases where any special powers are conferred upon the tenant for life are cases where the tenant for life is also the settlor![8] This is, perhaps, not altogether surprising since the settlor's principal motive in settling land was to preserve the land in the family and not to assist in its alienation. The Industrial Revolution, however, brought in its train an entirely new field of investment for capital and one, moreover, which offered a higher return than agricultural land, and it was not long before the restraint upon alienation which the widespread practice of subjecting land to settlements had imposed upon the landed classes came to be sharply felt. The only means of escape available in the case of existing settlements was for the present limited owner to procure the passing of a Private Act of Parliament authorising such owner to make limited dispositions of the land. The expense and trouble of obtaining such a Private Act was, however, considerable. On an average it has been estimated that the fees and costs of printing alone amounted to about £500 for each bill, but several are known to have cost as much as £1,800.[9] Moreover, more than one Act might be required, and in the case of one estate, six Acts were required costing nearly £7,000. Nevertheless, during the first half of the last century about 700 Private Estate Acts were passed.

This situation brought an awareness to later settlors of the desirability of inserting express powers in the settlement itself for allowing limited alienation, and the early nineteenth century books of precedents reflect this awareness.[10] Nevertheless, there remained a considerable backwash of existing settlements containing no powers of alienation, and it has been estimated that for each one of the 700 Private Estate Acts which were passed in the first half of the last century there were fifty other parties equally entitled to the assistance of the legislature in every respect except in means.[9] Clearly, therefore, the time was ripe for some public statute which, whilst imposing safeguards, would confer powers for enabling at least leases for fixed terms to be created by tenants for life, and others so that the tenants' security of tenure would be independent of the life of the landlord. Accordingly, in 1856, the Leases and Sales of Settled Estates Act was passed which conferred jurisdiction upon the Court of Chancery to authorise *trustees* of a settlement created in equity to grant occupation leases for twenty-one years, mining leases for forty years, and building leases for ninety-nine years,[11] and also to authorise a sale of the whole or any part of the property.[12] Where, however, the settlement operated at law so that there were no trustees (who were likely to be and, indeed, were under a duty to be impartial) the Act conferred upon tenants entitled to any settled estates for life, or for years determinable on life, or for any greater estate power (unless the settlement otherwise provided) to grant leases in possession for twenty-one years at a rack rent without taking a fine and, unlike the case of trustees, no application to the Court was necessary.[13]

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[8] Sir Orlando Bridgman's *Select Precedents* (1682), pp. 196–211.

[9] See Brickdale, *Settled Estates Act* (1861).

[10] See, *e.g.*, Bythewood and Jarman's *Precedents*, Vol. 9 (1833).

As was the case with so many of the mid-nineteenth statutory reforms, the Act did not go far enough. In the first place, the powers of sale and leasing conferred upon trustees were only exercisable with the authority of the Court of Chancery and secondly, the automatic powers conferred upon tenants for life and others could be excluded by express provision in the settlement itself. Something bolder was required and was provided by the Settled Land Act, 1882. This Act conferred *automatic* powers upon tenants for life, trustees for sale, and others to grant long leases, and to sell the whole or any part of the settled property, and declared void any provision in the settlement itself which sought either directly or indirectly to restrain the exercise of such powers. The conservatism of the 1856 Act which distinguished between trustees on the one hand and tenants for life on the other was for the most part thrown to the winds, and for the first time a tenant entitled to no more than a life interest in the settled land was given statutory power to dispose of the fee simple—and this in spite of anything to the contrary contained in the settlement. Sales of settled property could thus no longer be restricted but, of course, safeguards were imposed to ensure that the purchase money would be invested and the investments held upon the same limitations as the land had formerly been held so that when a tenant for life exercised his

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[11] s. 2.

[12] s. 11.

[13] s. 32.

power of sale, he did not obtain any direct benefit; for he acquired no more than a life interest in the proceeds of sale or the investments for the time being representing the proceeds of sale. The working of the Act may best be described by reference to an example. Suppose that Blackacre was limited to X and Y and their heirs to the use of A for life and subject thereto to the use of W for life and subject thereto to the use of the first and other sons successively in tail male born of H and W.[14] After 1881, H, so long as he was tenant for life, would have statutory power to sell the fee simple estate in the land provided always that he obtained the best price and that the purchase moneys were paid to at least two trustees to be held by them upon the same limitations. Similarly, as soon as W became entitled in possession as tenant for life, she would become invested with the like powers.

It will be appreciated that the 1882 Act did nothing to prevent a settlor from splitting up the legal fee simple estate so as to confer successive *legal* interests upon those entitled under the settlement but simply invested the 'reigning' tenant for life with overriding powers of disposing of the whole fee simple and thus, in effect, of divesting those entitled under the settlement of their legal interests in the land.[15] The 1882 Act had therefore travelled far from the common law idea that there could be no power without ownership. On the other hand, whilst accepting the spirit of the 1882 Act, the framers of the 1925 Act sought to reverse this state of affairs so as to secure, as far as possible, that the person having the *power* of disposing of the fee simple should also have the fee simple vested in him; and to that end two important changes in the law of settlements were made by the Law of Property Act and the Settled Land Act, 1925. First, the splitting up of the *legal* fee simple estate became impossible, and any attempt to do so now operates to create a trust of the legal estate and an appropriate splitting up of the equitable beneficial interest.[16] Secondly, the Settled Land Act provides that the person for the time being entitled in possession to any one of a number of limited equitable interests in the land including a life interest and an interest in tail, shall be entitled to have the legal fee simple estate vested in him by a vesting instrument, and *thereafter* to exercise the wide powers of disposing of such fee simple estate conferred by the Act.[17] The big difference, therefore, since 1925, is that instead of merely having *powers* of disposing of the fee simple, a tenant for life in whose favour a vesting instrument has been executed actually has the fee simple estate vested in him although, of course, it is not vested in him beneficially but as a trustee upon trust for himself to the extent of his beneficial life or other interest and subject thereto upon trust to give effect to the interests of every other person entitled under the settlement.[18]

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[14] A settlement in such form (shorn of a number of trimmings) was the most typical for three centuries before 1926: see Sir Orlando Bridgman's *Select Precedents* (1682), pp. 357–62.

[15] See *Re Stamford's S.E.* (1889) 43 Ch.D. 34.

[16] See s. 9 (2) of the Settled Land Act, 1925, and s. 4 (1) of the Law of Property Act, 1925.

## THE SCOPE AND OPERATION OF THE SETTLED LAND ACT, 1925

I have attempted to give what I hope is a sufficiently connected historical background to the Act in the belief that only by so doing is it possible to regard the provisions of the Settled Land Act as anything but arbitrary and unprincipled; for I do not wish to create the impression that the Act has by any means completely misfired. But the main purpose of this discussion is to consider whether the Act in fact meets present-day needs. I therefore propose to consider certain aspects of the application of the Act.

(1) *The 'unintended' settlement.* The most important type of settlement with which the Settled Land Act had to deal was the settlement of the large estate created in pursuance of a centuries-old tradition. But it is obvious that if the Act was to achieve its object, it must apply to the case of every state of affairs which does in fact constitute a 'settlement' within the meaning of the Act notwithstanding that the person creating such a state of affairs may be quite unaware of the consequences of the Act. This is one of the points where the somewhat elaborate machinery of the Act causes hardship. As an illustration, it is by no means uncommon for a person to make, without professional advice, a will leaving all his property, real and personal, to his wife for life and after her death for his children absolutely in equal shares. Such a will looks innocuous enough, but on the

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[17] See ss. 19, 20 and 13 of the Settled Land Act, 1925.

[18] See s. 16 of the Act.

death of the testator the widow will doubtless be astonished to learn that her husband has posthumously created two entirely separate sets of trusts of his property. So far as the testator's house and any other real property is concerned, the testator has successfully created a settlement within the meaning of section 1 of the Settled Land Act the effect of which is that the will is deemed to be a trust instrument[19] and the widow will in due course be entitled to ask the executor to execute a vesting assent in her favour vesting the testator's house and any other real property in herself as tenant for life for the purposes of the Act. It is highly doubtful whether the testator intended his wife to have the entire legal estate vested in her in such a way, but if he did, then presumably he had a similar intention in regard to his personal property such as his motor-car and furniture. In relation to such property, however, the Settled Land Act has no application and accordingly, under the ordinary law of trusts, such property must remain vested in the executor of the will unless and until he appoints other trustees to act in his place. Had the testator sought professional advice he would undoubtedly have been advised to effect his wishes by means of a testamentary gift to trustees upon trust for sale coupled with a direction that no sale should take place during the life of the widow without her consent. Such method would have avoided the application of the Settled Land Act altogether and secured that both the real property and the personal property of the testator would be held under the same set of trusts with consequent saving in inconvenience and expense.

A further illustration of an unwitting creation of a Settled Land Act settlement is provided by the case of *Bannister* v. *Bannister*.[20] In that case a woman who owned the freehold of a cottage desired to realise some capital thereon whilst at the same time reserving a right to continue to reside therein. She therefore approached her nephew and it was agreed that he would purchase the cottage and allow his aunt to continue to live there rent free for as long as she wished. The aunt duly conveyed the cottage to the nephew in fee simple no mention being made in the conveyance of the nephew's *oral* undertaking to allow the aunt to continue to reside there. Subsequently, the nephew desired to sell the cottage with vacant possession and brought an action for possession against the aunt. Now since the aunt paid no rent, she was not entitled to the protection of the Rent Restriction Acts, but she went one better and counterclaimed for a declaration that under the terms of the nephew's undertaking he held the legal estate in the cottage upon trust for the aunt for life or until she should cease to reside therein and subject thereto for the nephew in fee simple, that the cottage was therefore the subject of a settlement and that she was accordingly entitled to a vesting instrument vesting the legal estate in the cottage in herself as tenant for life for the purposes of the Settled Land Act. The Court upheld all three of the aunt's contentions and directed the nephew to execute the necessary instruments in her favour. Thus in the result, the effect of the nephew's undertaking to allow his aunt to live rent free in the cottage was to vest in the aunt the exclusive power (*inter alia*) of selling the cottage in fee simple in pursuance of her statutory powers.[1]

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[19] s. 6 of the Act.

[20] [1948] 2 All E.R. 133.

(2) *The dual capacity of the tenant for life.* Once a vesting instrument has been executed in favour of the tenant for life in accordance with the Act, he is at once both a trustee of the legal estate in fee simple[2] and a beneficiary in respect of his life or other limited beneficial interest. As a trustee he is bound to have regard to the interests of all the persons entitled under the settlement yet as a beneficiary he is likely to seek to further his own personal interests, and a conflict of interest and duty is thus clearly set up in the case of every settlement falling under the Act. Thus, whilst an unbiased trustee might think it desirable, if the property market were falling, to sell the settled land, a tenant for life who has only his own personal interests at heart might retain it to the damnification of the remainderman next entitled. It is true that some protection against a capricious *exercise* of a tenant for life's powers is provided by section 107 of the Act which requires him to act as a trustee in such exercise, but this section does not apply to a capricious non-exercise of his powers, and in any event the cases show that the duties imposed by the section are very slight.[3] The 'reign of the tenant

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[1] See also *Bacon* v. *Bacon* [1947] P. 151.

[2] s. 16 of the Act.

[3] See *Re Stamford's S.E.* (1889) 43 Ch.D. 34.

for life' should, in my submission, and particularly in the case of 'unintended' settlements be brought to an end by placing the ownership of and powers over the legal estate in the hands of independent persons.

(3) *The nature of estate ownership under the Act.* Whilst the Settled Land Act has, on the surface, shifted the emphasis from powers to estates by securing not only that the tenant for life shall have power to dispose of the fee simple but also that the fee simple shall be vested in him, the fact is that so far as a purchaser is concerned, the shift appears to have been nominal rather than real. This is illustrated by the decision of *Weston* v. *Henshaw*[4] where the facts were that a father sold and conveyed the fee simple in certain land to his son. The son subsequently sold the land back to his father who thereupon settled it upon his son for life with remainders over. A vesting deed was executed in favour of the son vesting the legal estate in him as tenant for life for the purposes of the Act. The son then turned rogue, and by suppressing the conveyance by the son back to the father and also the vesting deed, represented himself to a mortgagee as being the beneficial owner of the property under the original conveyance by the father to the son, and purported to mortgage the property as beneficial owner. When the fraud was discovered, the question was whether the mortgagee, who had taken his mortgage in good faith and without actual or constructive notice of the settlement, had obtained a good title *vis-à-vis* those entitled under the settlement. It was held that since the property was, at the time of the mortgage, the subject of a vesting instrument under the Settled Land Act, therefore section 18 of the Act applied. This section provides that where land is subject to a vesting instrument then any disposition of the land which is not authorised by the Act shall be void. It was clear that the mortgage by the son was not a disposition authorised by the Act since the mortgage moneys were paid to the son for his own personal benefit and accordingly it was held that the mortgage was void. Apart from section 18 of the Act, it is clear that at common law the decision would have gone the other way,[5] and it is therefore difficult to resist the conclusion that the effect of the section is that the fee simple which is vested

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[4] [1950] Ch. 510.

[5] See *Cave* v. *Cave* (1880) 15 Ch.D. 639; *Joseph* v. *Lyons* (1883), 15 Q.B.D. 280.

in a tenant for life is not a common law fee simple but a statutory fee simple, *i.e.*, a fee simple whose incidents are determined exclusively by the Settled Land Act. In any event a new hazard is created for a purchaser of land against which there appears to be no means of guarding.

(4) *Cases outside the Act.* The fourth and last general criticism I wish to make of the Settled Land Act is that there appear to be several situations which come within the mischief of the Act but which are nevertheless outside its meshes. The three most important of these fall under the following headings.

(a) *Leases.* It does not seem to be generally realised or to have been fully appreciated by the framers of the 1925 legislation that the legal term of years absolute is to a very large extent outside the provisions of the Act. Two cases must be distinguished: (i) Where a term of years is already in existence—it will become subject to the provisions of the Act in precisely the same circumstances as would a fee simple. With this case, therefore, I am not here concerned. (ii) Where, however, a term is created and *at the time of such creation* limitations or restrictions upon enjoyment and disposition are imposed, then unless such limitations or restrictions include references to the dropping of a life or the determination of a determinable life interest, the *beneficial* interest so created will be a legal term of years absolute within the meaning of the Law of Property Act,[6] and consequently will not be settled land.[7] Thus, a grant of land 'to X for 999 years so long as X and the heirs of his body shall from time to time reside on the premises' would prima facie create a legal term of years absolute which would be virtually inalienable outside X's immediate family either by deed or by will by reason of the limitation as to residence. Historically, the leasehold estate in land paled into insignificance by the side of freehold estates, and this may explain why the two forms of estate have been treated so differently by the 1925 legislation. But at the present time long leases differ hardly at all in value or desirability from the fee simple estate, and it seems likely that advantage may at any time be taken of their greater flexibility to undermine the operation of the Settled Land Act.

[6] s. 205 (1) (xxvii).

[7] Since with the exception of the case mentioned in s. 1 (1) (v) of the Settled Land Act, 1925, a trust is always required before a settlement arises.

(b) *Rights of re-entry.* It seems that by virtue of the provisions of the Law of Property (Amendment) Act, 1926, a fee simple subject to a legal or equitable right of entry or re-entry is always capable of existing as a legal estate, and is accordingly outside the provisions of the Settled Land Act. Thus, for example, a grant of Blackacre 'to X in fee simple but if X becomes a Roman Catholic the grantor shall be entitled to re-enter and forfeit the estate' would vest a legal estate in X which, however, would be virtually inalienable during X's lifetime because of its liability to determine; and the Settled Land Act would not apply. The view has been expressed that these provisions of the Law of Property (Amendment) Act, 1926, only apply where the right of re-entry in question is annexed to a legal rentcharge, but it is difficult to construe the words of the statute in this restricted sense and some amendment of the law would seem to be indicated.

(c) *Licences.* The licence to occupy land has been held in a number of recent cases to be something more than a mere contractual right and appears to be fast approaching the status of a full equitable interest in land. If and when this status is reached, it would become possible to create successive rights of enjoyment in land by creating successive licences and thus 'settle' land in a way which would escape the provisions of the Settled Land Act.[8]

### POSSIBLE LINES OF REFORM

Having dealt with the origin and certain aspects of the functioning of the Settled Land Act, it remains to suggest what reforms, if any, could usefully be made. As far as I have been able to discover, three suggested reforms have, at different times, been put forward. First, the late Professor Malcolm Lewis[9] suggested in 1938 that many of the difficulties to which the Act has given rise and in particular the hardship which arises in the case of 'unintended' settlements would be avoided if the Act were amended so as to provide that in the case of all settled land the legal estate should be vested in the trustees of the settlement by a vesting instrument which would also declare who is the tenant for life of the settlement. It is, however, difficult to see that any real advantage would be gained by the adoption of this suggestion. Some provision would have to be made for bringing the vesting instrument up to date from time to time so as to name the correct tenant for life, and in addition it would set the clock back to the pre-1926 position of the statutory powers being divorced from estate ownership.

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[8] See Marshall and Scamell 'Digesting the Licence' (1953) 31 *C.B.R.*, p. 849.

[9] 'Settlements of Land' (1938) 54 *L.Q.R.*, p. 576.

Secondly, in 1943, the late Professor Harold Potter[10] suggested that the Act should be amended so as to confine its operation to those cases in which it is the intention to create such a settlement whilst imposing a statutory trust for sale in the case of 'unintended' settlements.

Thirdly, whilst putting forward the above suggestions as compromises, both Professor Lewis and Professor Potter recognised that there was a good deal to be said for the complete repeal of the Settled Land Act and its replacement by a statute requiring all settlements to be made by means of a trust for sale with suitable provisions to secure that any attempt to create a settlement of property *in specie* would only take effect behind a trust for sale. With this third and somewhat drastic view, a good many other conveyancers agree, and I venture to suggest that its adoption would solve many of the present difficulties, and in addition secure certain distinct advantages over the present system. I would go a little farther, however, and bring personal property into line with realty in this respect so as to avoid the present necessity for creating two separate sets of trusts wherever it is desired to settle a fund of mixed realty and personalty. If such a reform were made the following would be some of the beneficial results.

(1) The statutory imposition of a trust for sale in cases when, at present, a settlement under the Settled Land Act would arise, would avoid the worst consequences which at present attend the 'unintended' settlement. Thus, in the case of the testator who makes a home-made will leaving all his property, real and personal, to his wife for life with remainder to his children, only one trust would thereby be created and its administration would be inexpensive.

(2) The conflict of interest and duty which at present

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[10] 'Strict Settlement and Trust for Sale' (1943) 8 *The Conveyancer and Property Lawyer*, p. 147, at p. 149.

devolves upon every tenant for life would not ordinarily arise.

(3) The legal position created by the trust for sale, although often described as fictitious by reason of the application of the equitable doctrine of conversion, is, in reality, far less fictitious, in my view, than the position created by the Settled Land Act. Under the Settled Land Act, the existence of wide powers of disposition over the settled property ensures that the interests of those entitled under the settlement are in fact no more than interests in the property which happens for the time being to constitute the trust property and not interests in the property *in specie,* although by the fiction of section 75 (5) of the Settled Land Act such interests are deemed, for most purposes, to remain interests in land even though all the settled land has been sold and converted into capital money.[11] On the other hand, the trust for sale clearly recognises the true nature of the beneficiaries' interests as being in the rents and profits until sale and in the proceeds of sale after sale.

(4) The hazards to a purchaser of the operation of section 18 would disappear.

(5) Under the trust for sale, some measure of control over the land can be vested in the remainderman by requiring that no sale shall take place without his consent so that a fairer balance can be struck for giving effect to the wishes of the beneficiaries.

## CONCLUSION

Within the scope of the present discussion it has, of course, only been possible to deal very generally with the matter, and if the trust for sale is to replace settlements under the Settled Land Act, the question also arises whether some amendment in the law relating to trusts for sale would not also be desirable. This is, of course, bordering upon quite another story, but close attention would have to be paid to the extent of enjoyment of beneficiaries under a trust for sale and to the method for determining such a trust.

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[11] *Re Armstrong* [1943] Ch. 400; *Re Cartwright* [1939] Ch. 90.

## 9

# THE NEW LAW OF COPYRIGHT

A. Goodman

The notion of copyright—of rights in intellectual property accruing to its creator—is, by the time-table of legal conception, a modern one. It is a conception unknown to the ancient systems of laws. Although many of the institutions of the Roman law are eminently suitable in their pristine and unchanged shape for application to the most modern types of property both corporeal and incorporeal and have provided the basis for the corresponding institution in many modern—and for that matter non-civilian legal systems—there is nowhere to be found, for instance, in that huge compilation of Justinian, the Corpus Juris Civilis—either in the Institutes or the Digest or the Codex—a single word to suggest that an author or artist could be entitled to prevent the multiplication of copies of his work or to prevent others from public performance, adaptation or any other usage whether fair or unfair; and it is a chastening reflection (if little encouragement to the development of copyright) that neither Homer nor Aristophanes, neither Vergil nor Ovid, would have enjoyed any protection for any of their writings or have been in receipt of a single royalty statement. Similarly the works of the Dutch jurists, which furnish the primary sources of the Roman-Dutch law, are no less free of any such notion as copyright.

Indeed, so belated was the emergence of a right of this character that even when the invention of printing facilitated the reproduction of copies so as to encourage the most diffident of authors to prefer some claim to participation in the commercial exploitation of his brain-child, it was nevertheless not until some centuries later that any such right was asserted and, after further delay, recognised.

### THE DONALDSON CASE

It was not, in fact, until 1774—in the famous case of *Donaldson* v. *Becket*[1] that the nature and extent of an author's copyright was determined. The judges were directed to attend the House of Lords and three questions were posed.

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[1] 4 Burrow's 2408; 2 Brown's Parliamentary Cases 129.

(1) Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing it for sale and might bring an action against any person who printed, published and sold the same without his consent? To this query, an answer was given in the affirmative by ten judges—with one only expressing a contrary view.

(2) The second question was: if the author had such a right originally, did the law take it away upon his printing and publishing the book? And might any person afterwards reprint and sell for his own benefit, against the will of the author? This time the answer was no—the right was not extinguished by publication—by a majority of eight to three.

(3) Finally, the third question was whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the work in perpetuity by the common law—to which the answer, by a margin now narrowed down to seven to four, was in the affirmative.

### TERM OF COPYRIGHT

All three questions had been answered in favour of the author. But authors would have been ill-advised, then as now, to place undue reliance on the benevolent disposition of lawyers, and not for the last time, what seemed to open up a golden prospect in literary affairs, was snatched away by an unkind gloss, for the majority of the judges held that, upon publication, the common law right which existed in perpetuity became merged in and cut down to the terminal right created by the first of the Copyright Acts, that passed in the eighth year of the reign of Queen Anne.

The decision in *Donaldson* v. *Becket* caused great resentment in, ironically enough, bookselling circles—the then equivalent of publishing circles. The booksellers, whom, as we shall see, time does not change in their approach to these problems, complained bitterly that they had bought and paid for many works on the footing of perpetual copyright. They were aggrieved by a limitation which under the first Copyright Act gave them only a certain period of fourteen years, with a second fourteen years extension only if the author was alive at the date of the expiry of the first term. It is a popular belief that a particular bitterness was felt by the bookseller who had paid to its author Mr. Justice Blackstone a large sum for the copyright in his famous legal work since he was one of the judges to arrive at the much criticised judgment.

In a charming passage in his little book on copyright,[2] Augustine Birrell considers the immense social implications of *Donaldson* v. *Becket* and arrived at the unassailable conclusion that no sensible argument can be advanced in favour of a perpetual copyright.

'Half a century,' he wrote, 'writes *Finis* to most authors, while in the case of the few who prove to be for all time, the feeling of mankind would be one of resentment were there now living in Paternoster Row or Madrid or Florence a capitalist who could say, "Hamlet is mine," "Sancho Panza is mine," "The Inferno belongs to me." Who would not feel that this disreputable *bourgeois* was the enemy, not the friend, of the world-wide genius of Shakespeare, of Cervantes, of Dante.'

The case could not be put more cogently but it remains an evergreen controversy and it is, I believe, still the case that in Mexico, Venezuela and Guatemala—three States where literature is not at its most flourishing—the author does, or did until recently, enjoy a perpetual copyright. Under the 1911 Copyright Act, the term of copyright became the life of the author and a period of fifty years after his death. With slight exceptions, this has been re-enacted by the 1956 Act with the difference that some perfectionist has decreed that the fifty year period shall run from the end of the calendar year in which the author dies—so that authors are now recommended, for the benefit of their estates, to avail themselves of the fatal opportunities afforded by our winter months!

The Copyright Committee,[3] on whose Report the new Copyright Act, 1956, is substantially based, heard a number of witnesses on the question of the appropriate term of protection. As they point out in paragraph 16 of the Report, the two extremes were polarised by Dr. Mary Stopes who argued for perpetual copyright and Professor Sir Arnold Plant who urged a much shorter period and a fixed and definite one at that. Neither view prevailed. Any inclination the Committee might have felt to shorten the monopoly term was fatefully dealt with by the evidence of Sir Stanley Unwin—recognised as the doyen of English publishers—who rendered his craft yet a further service by establishing to the satisfaction of the Committee that 'in order to remain in business, a publisher must regard his business as a whole, and must be allowed to balance his unsuccessful ventures against the successful ones.' In short, that as the unsuccessful book flops to oblivion in five minutes, the successful one must enjoy exclusive selling rights for fifty years and more.

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[2] *Law and History of Copyright in Books* (Cassell & Co. Ltd., 1899), p. 25, now alas out of print and available only by chance purchase—but well worth a search.

[3] *Report of the Copyright Committee*, Cmd. 8662 (1952).

## INTERNATIONAL PROTECTION

It is readily appreciated that copyright, to have its full value, must be an international conception. France, as in so many matters of the mind, led the way. She was the first of the nations to confer rights on an author regardless of nationality. Following her lead, the International Copyright Act of 1838 enabled her then Majesty in Council to confer on the authors of foreign books the sole right to publish within the British Dominions for the term then permitted to British authors. Other enactments followed and in 1851 a Convention was concluded between England and the French Republic for reciprocal protection of authors in each country.[4]

Thereafter numerous conventions established such a position between Great Britain and other foreign powers. The world of letters (as it should) led the way in international amity, concord and decency, culminating in its transcendent achievement, the Convention of Berne in 1886—a red-letter day in literary history—which, followed by the 1896 Paris Conference, established the position within the signatory countries that upon publication in any one country, copyright protection according to the municipal law of each signatory was afforded elsewhere throughout the Copyright Union.

The first signatories were Germany, Belgium, Spain, France, Great Britain, Italy, Switzerland and, to their eternal glory, the Bey of Tunis and the President of Haiti.

For authors, and especially for authors writing in England, the most significant and lamentable absentee was the United States of America. Readers do not need to be reminded of the denunciations of Charles Dickens against the literary piracy of America—of the misappropriation of the Gilbert and Sullivan operas and of the other enormities that could exercise the minds of pre-atomic generations. Until 1891, foreign authors enjoyed no protection in the United States. Thereafter, and this remained the case until the introduction of the Copyright Act, 1956, British authors could obtain copyright protection by first publication and registration of copyright at Washington and subsequently a protective period of *ad interim* copyright could be obtained for works in English, solely by registration.

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[4] 40 *Br. & For. St. Pap.* (1850–51), p. 27.

## THE ACT OF 1911

The Copyright Act of 1911 followed and embodied the general provisions of the original Berne Convention as revised at Berlin in 1908, and the Rome Convention in 1928 did not involve any alteration of the Act.

The 1911 Act must, on balance, be regarded as an extremely satisfactory piece of legislation. In a relatively short measure (of seventy-seven sections) the law of copyright was codified in a fashion which stood the test of over forty years of immense development in the fields of literary, dramatic and musical property. It is relevant to remember that in that period occurred the major developments of the film industry and radio broadcasting and an immense increase in the popularity of gramophone recordings. In addition the printing and sale of books attained a volume which now constitutes an important industry in every civilised country.

The Act on the whole provided a satisfactory legal framework for all such development. Litigation on the subject was commendably sparse, and an attempt to maintain even an annual series of copyright reports proved abortive because no single year furnished enough cases of novelty for the slimmest volume.

## THE NEW COPYRIGHT ACT

However, a new Act was needed largely because of technical development, and particularly of television and the Television Act, 1954, which raised problems no amount of prescience could have foreseen forty years ago.[5] This led to the passing of the Copyright Act, 1956.[6] The present Act must, unhappily, be accepted with great reserve. It is open to serious criticism on the grounds both of omission and commission. In parts obscurely drafted, its principal fault is the fact that it is devoid of any consistent underlying principle and contains some inexplicable contradictions and inconsistencies.

In the light of the completed piece of legislation, one may ruefully reflect on the expressed intention of the Government in introducing the Act. First introduced in the House of Lords, the words of the Lord Chancellor could reasonably have aroused fond hopes in literary circles:

> 'It is important to authors and composers of music, and to innumerable other people to whom we owe immense pleasure in our lives. It is also important that a world which concentrates of necessity so greatly on the destructive aspects of modern thought and invention should turn occasionally to the side of intellectual achievement and the requirement *to help those who contribute to the advance of the spiritual side of man.*'[7]

Here indeed was a great opportunity to give a badly needed stimulus and encouragement to the world of letters and those 'who contribute to the spiritual side of man' could legitimately have enjoyed great expectations. Unhappily it emerged that the Government's identification of these benefactors did not coincide with normal beliefs. If the Act is studied closely, advantageous changes will be found enuring to (a) film companies, (b) gramophone recording companies, (c) publishers and (d) the British Broadcasting Corporation and the Independent Television Authority and, through the I.T.A., the programme contractors, some benefit to (e) libraries and students using them and lastly a snug little benefit to (f) tortfeasors. Except in one, admittedly important, instance, I have been unable to find a single material increase in the rights of authors, composers or artists, but many instances of the whittling down of their rights.

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[5] *Cf.* E. R. H. Ivamy, 'Copyright Law Revision' (1953) 6 *Current Legal Problems.*

[6] This Act came into force on June 1, 1957. See The Copyright Act, 1956 (Commencement) Order, 1957 (S.I. 1957, No. 863 (c. 6)).

[7] *Parl. Deb., Official Report,* House of Lords, November 15, 1955, Vol. 194, col. 510 (italics added).

The important instance to which I allude is that by dint of alterations introduced in the Act, the Brussels International Copyright Convention of 1948[8] amending the original Berne Convention of 1886 and the Universal Copyright Convention, 1952,[9] can now be ratified so that copyright for British books may thereby be secured in the United States on publication, without any extra-territorial formalities. All that will be needed is for a simple symbol ©, with the name of the copyright proprietor and the year of publication to be inserted in the book. This is a happy development and ends a discreditable era in international relations but, as in practice, an effective method of reciprocal copyright protection had been devised between the United Kingdom and the United States, the significance of the change can be exaggerated and a heavy price is paid for it.

Within the scope of this paper it is not possible to do more than point to a few of the major changes effected by the new Act and my main theme will be directed towards establishing the validity of my criticism that the Act contains some contradictions of principle and that the arguments and assertions used to justify certain of the changes are rendered totally invalid by other changes for which contradictory arguments have been called in aid.

## PROTECTION AGAINST SUPPRESSION

The best illustration of this criticism is to be found in one of the most important changes effected by the new law, which is achieved by a repeal of three provisions in the 1911 Act which, read together, furnished a valuable little code of protection for the author against monopolistic suppression. Under sections 3 and 5 (3) of the old Act, notwithstanding that the term of copyright was for the life of the author and a period of fifty years after death, any publisher might publish a work after the expiration of twenty-five years from the death of the author on giving a requisite notice and on paying an appropriate royalty of 10 per cent in accordance with Board of Trade regulations. This provision has worked satisfactorily[10] since 1911 and operated as a valuable means of ensuring that, after the death of an author, a lack of interest by the original publisher or even some less creditable motive should not prevent the publication of a work for which there was still a public demand. Moreover, as a complementary provision section 5 (2) provided that an assignment by an author who was the first owner of the copyright could not operate to vest in the assignee any rights extending beyond the expiration of twenty-five years from the death of the author. This latter provision had the beneficial effect that, however, improvident the original bargain struck by the author—and the improvidence of such bargains have been legendary since Milton disposed of *Paradise Lost* for a sum of fifteen pounds—it could not be put out of the author's power to prevent some ultimate if small benefit coming to his estate at the tail end of the copyright period if the work had achieved a sufficient success to warrant continued sale.

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[8] Brussels, June 26, 1948, Cmd. 7815 (1949).

[9] Geneva, September 6, 1952, Cmd. 8912 (1953).

[10] Although giving rise to unresolved doubts of interpretation as to whether a portion of a work might be published.

To be read with these two sections was section 4 of the old Act which enabled an application to be made to the Judicial Committee of the Privy Council at any time after the death of the author or composer to allow the republication of a work if it was alleged that the copyright owner was withholding the work in a fashion injurious to the public interest. It is true that this particular section, doubtless on account of the unnecessarily august nature of the tribunal, had never been invoked[11] but it undoubtedly served a healthy moral purpose and its retention, with some less portentous tribunal, would have been of value, a point I think confirmed by the recent rumpus over refusals to license performances of Shaw's *Pygmalion* allegedly as a protection for a musical version which has not yet been seen in this country.

The Copyright Committee were satisfied, on the basis of very vulnerable evidence, that the sections now repealed had outlived their usefulness. It is strange, however, that they should not have been preserved if only on the footing that they could do no possible harm and might occasionally do a little good. The major reason advanced for their repeal seems to me specious. It was that the representatives of the Berne Union at Brussels conceived that these provisions constituted an encroachment on the absolute right of authors. It is regrettable in the extreme that they should have been permitted to form this view, since all three provisions were devised and operated for the benefit of authors and this would have seemed self-evident.

[11] There appears to be no record of any such application.

## ENCROACHMENTS INTO THE RIGHTS OF AUTHORS

In marked contrast to the solicitude for the rights of authors represented by the repeal of the valuable 1911 provisions to which I have just referred, the new Act contains several most serious encroachments into the rights of authors, artists and composers which the promoters do not apparently regard as in any way inconsistent with the principles of the Brussels Convention. It is impossible to reconcile the concern of the Government to ensure strict adherence to their treaty obligations with some of the provisions of the new Act of which I would instance the following:

### (1) *Works incorporated in Films*

Under section 13 of the Act, a new copyright is created in a cinematograph film. This copyright was originally intended to subsist for a period of twenty-five years but on reasoned representations from film interests, the period was extended to fifty years. The copyright vests in 'the maker' of the film, who is defined as the person 'by whom the arrangements necessary for the making of the film are undertaken.' This is an odd definition and might legitimately bestow the right on some very minor personage in the hierarchy of a film company. The creation of this new copyright is valuable and removes the obscurity under the previous law which extended copyright protection to a film by means of protecting the various constituent elements. What is less commendable, however, is subsection (7) which enacts that, after the copyright in the film has expired, any one who then performs the film does not infringe any literary, dramatic, musical or artistic work incorporated in the film. It is made clear later in the Act that the licence created by this section to perform otherwise copyright material does not injure the residual copyright in the work except in so far as it is contained in the film.[12]

It is, however, quite anomalous that copyright music and literary material should suddenly be deprived of protection which it would otherwise have enjoyed, because the film copyright has expired. Various arguments from supporters of the film industry were adduced in a correspondence in *The Times* in support of this provision, but all of them had an unconvincing ring and, most of all, the suggestion that it was always open to the author or musician to protect his position some fifty years hence by his contractual arrangements with the film company.

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[12] Section 16 (6).

### (2) *Filming of Works for Television*

A minor encroachment, but a major novelty, is to be found in section 6 (7) of the Act which empowers the B.B.C. or any commercial television company which enjoys a licence to broadcast a literary, dramatic or musical work in a 'live' version to make a film of the work instead and to broadcast the film version. It is true that the presentation of the film is restricted to the number of broadcasts that would have been permitted of the 'live' work and that the film must be destroyed before the end of twenty-eight days after the last broadcast date. It is astonishing, however, that this particular right, which is pre-eminently suitable for a contractual arrangement, should be included in a Statute and difficult to see why the author or composer should have thrust upon him the duty of ascertaining whether in fact the film has been destroyed. Since no provisions are inserted in the section requiring any replies to be made to his inquiries and he has neither a right of entry nor of search, his task may sometimes be unenviable.

### (3) *Performing Rights in Gramophone Recordings*

Section 12 (5) of the Act is one which was the subject of particularly bitter opposition on behalf of composers and other musicians and is one which now gives statutory blessing to what in its day was a totally unexpected windfall to the gramophone industry. It is now in copyright circles a legal legend that the late Sir Stafford Cripps in *Gramophone Co., Ltd.* v. *Carwardine & Co.*[13] was able to convert the copyright bestowed on a gramophone record in the 1911 Act for the purpose of preventing the plagiarism of that record by dint of re-recording by some rival company into a 'performing right' whereby, without the payment of fees, no one could play the record in public. As a result of this decision the gramophone companies lost no time in establishing a fee-collecting organisation which has exploited in a perfectly legitimate but most efficient fashion the new performing right. Since it has long been believed not to have been the

[13] [1934] 1 Ch. 450.

intention of the draftsman of the 1911 Act to create any such right, it is strange that the position should not at least have been left open as it was under the previous Act. In fact it might beneficially have been resolved in a fashion contrary to the present one. It is true that a slight mitigation has been introduced in fulfilment of a promise made to Lord Lucas in the Lords' debate whereby the playing of a record in residential or club premises of a charitable character is not to be regarded as an infringement. For the major benefit now enshrined in the Act, the gramophone companies will, I feel sure, happily cede this crumb of benevolence.

### (4) *Compulsory Licence of Recorded Music*

Section 8 of the Act reproduces one of the most controversial (and puzzling) provisions of the 1911 Act whereby in any case in which a copyright work of music has previously been recorded by a gramophone company, any other company can record the same work without licence or consent upon payment of a royalty of 6¼ per cent of the ordinary retail selling price of the record. One can dwell on this section at considerable length and speculate for hours as to its original motivation without finding any rational justification. It was promised in the House of Lords in the early stages of the Bill that with regard to 'serious' music provisions would be inserted to safeguard the standards of performance and reproduction. In a note elsewhere[14] on the Bill (before it reached the Commons), I speculated about the task of the parliamentary draftsman who might have to translate this promise into parliamentary language. Discretion has indeed proved the better part of valour and nowhere in the Act is to be found any trace of the original pledge.

### (5) *The Performing Right Tribunal*

Part 4 of the new Act is entirely novel; again it follows a recommendation of the Copyright Committee and, in my view, is perhaps even more at variance with the Brussels principles of liberty of copyright than the provisions to which I have already referred.

Provision is made for the establishment of a new tribunal to be called the Performing Right Tribunal which will consist of a chairman appointed by the Lord Chancellor who must be a lawyer (either Scottish or English) with not less than seven years' standing or an ex-judicial officer of not less than two years' standing, and of four other persons.

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[14] 'The Copyright Bill,' 19 *Mod. L.R.* (1956), p. 186.

The Tribunal seemingly has no jurisdiction over individual copyright owners but the section is obscurely worded and in particular lacks any clear-cut empowering clause which defines its precise powers. However, in part by inference, its functions would appear to be to determine disputes arising between licensing bodies and persons requiring licences and a licence is defined in the Act as one granted by or on behalf of the owner or the prospective owner of the copyright in a literary, dramatic or musical work or in a sound recording or a television broadcast. This section does not include an individual copyright owner and indeed it would seem that it does not even include an individual who makes it his business to act as agent for the granting of licences on behalf of copyright owners but is designed to apply to such organisations as the Performing Right Society in the musical field, and the organisations representing the gramophone companies or otherwise dealing with grants of licences in respect of mechanical rights. In view of this obvious intention the wording is unexpected as a licence is defined as extending to 'a *literary, dramatic* or musical work, or in a sound recording or a television broadcast.'[15] Since hitherto there has never been in existence any single body to which—as in the case of composers—the whole of the copyrights in bulk of literary or dramatic works are vested and from whom a licence is exacted, the operation of the section in these fields must be conjectural. In the ordinary way the publisher of a book or the impresario who presents a play negotiates direct with the author or dramatist. The words may be mere surplusage or it may be that more is to be read in them than at present appears to be the case.

However, whatever the scope of the Tribunal it will undoubtedly function in relation to such organisations as the Performing Right Society and the others I have mentioned and it will also function in relation to the grant of licences by the B.B.C. or the I.T.A. in respect of programmes either sound or visual initiated by those authorities. For that purpose the Fifth Schedule of the Act contains a provision whereby the B.B.C. and the I.T.A. may jointly appoint an organisation to be charged with the function of granting such licences and to which applications would be made by prospective licensees and which would be subject to the authority of the Tribunal. Alternatively, the Schedule enables the B.B.C. or the I.T.A. to appoint separate organisations. If the present vigorous competition between them is any pointer, it is unlikely that a single organisation would serve the purposes of both.

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[15] Section 24 (2) (italics added).

The Tribunal has power to vary any licence scheme, which means a scheme established by such a body as the Performing Right Society, setting out the nature of the licences they are prepared to grant and their charges; and to declare persons to be entitled to licences (in cases not covered by a scheme) upon such terms and conditions as the Tribunal considers reasonable.

It will be seen, therefore, that even if the provisions of the Act cannot be interpreted to bestow a right on the Tribunal to compel an individual copyright owner to grant a licence the Tribunal can indirectly achieve this result where the rights of the copyright owner are exercised by a licensing body or have been assigned to such a body. The section, however, is certainly not in terms a re-enactment of any equivalent of section 4 of the 1911 Act.

It may be thought that the machinery of the Tribunal is an expensive and cumbersome one to achieve the desired result.

## OTHER CHANGES

It is, I think, appropriate and fair to instance some of the other important changes effected by the Act. I mentioned earlier on that the work conveyed no real benefit to the creative person. It does, however, contain a number of useful provisions to tidy up loose-ends of the law. In the case of an unpublished work which is open to inspection in a museum or library, the work can be published without infringement of copyright after an interval of 100 years from the date that it was first made.[16] A new copyright is created in an edition of a work, in relation to any special typography or format, and a very radical change indeed has been made with regard to the remedies for infringement of copyright. I am indebted to Professor Dennis Lloyd for pointing out to me the implications of this particular change which are, in fact, more far-reaching than might otherwise seem the case.

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[16] Section 7 (6).

Under section 18 (2) of the Act it is provided that a plaintiff shall not be entitled in virtue of this section to any damages or to any other pecuniary remedy (except costs) where it is proved that, where the articles converted were infringing copies, the defendant believed and had reasonable grounds for believing that they were not infringing copies. Under the 1911 Act, to obtain protection a defendant would be required to prove that he was unaware that copyright existed in the work (and this still remains a protection under the new Act) but there is a clear-cut difference between ignorance that copyright exists in the work—a matter of the greatest difficulty to prove—and ignorance that any particular copies of the work constitute a breach of copyright, since the question of whether or not such copies were an infringement would normally depend upon contractual arrangements between the copyright owner and the publisher of which the defendant could not be expected to know. In many cases which have hitherto and properly been regarded as appropriate for the award of damages, the umbrella of this section will now furnish complete protection.

### REGISTERED DESIGNS AND COPYRIGHT

Finally, the Act makes important changes in regard to the law relating to registered designs. The Copyright Acts are not the only statutes concerned with protection of artistic works. The Registered Designs Act, 1949, gives protection for up to fifteen years to designs (*i.e.*, features of shape, configuration, pattern, or ornament) applied to articles by industrial processes or means and registered under the Act in respect of such articles. In order to qualify for registration, designs must be new or original but the test of novelty or originality is not the same as the test of originality in the case of the Copyright Act. Moreover, different considerations apply to infringement. In the case of works protected by the Copyright Act the question is whether the alleged infringement has been copied from the protected work. In the case of registered designs the question is whether the alleged infringement is the same or substantially the same as the registered design. Absence of copying does not provide a defence.

Section 22 of the Copyright Act, 1911, excluded from the Act any design capable of being registered under the Registered Designs Act and which was used or intended to be used as a model or pattern to be multiplied by any industrial process, and rules were made specifying the circumstances in which designs were to be deemed to be so used. As a result of these rules, whether or not the design enjoyed copyright depended to some extent upon the intention of the artist at the time of making the design.

Rules were also made excluding from registration, under the Registered Designs Act, certain articles primarily of a literary or artistic character such as, for example, certain works of sculpture, wall plaques and medals and certain printed matter such as bookjackets and trade advertisements. These excluded articles, if they were original artistic works, enjoyed copyright.

That position was found unsatisfactory, principally because the borderline between the two Acts was ill-defined and because certain works might be protected under both Acts. The new Copyright Act has made substantial changes.

Under the new Act[17] the position (ignoring the transitional provisions which cannot now be considered) is as follows. Copyright will subsist in every original artistic work, regardless of the intention of the author, and will continue to subsist, but with modifications, if a corresponding design (*i.e.*, a design which, if applied to an article, results in a reproduction of the artistic work) is registered under the Registered Designs Act in respect of any articles, or if articles, to which a corresponding design has been applied industrially by or with the licence of the copyright owner, are sold or hired, etc., the design not being registered in respect of such articles.

It is difficult in the space available to give an intelligible summary of the modifications referred to above. If the author of an artistic work registers a corresponding design, any act done either during the subsistence of the registration or thereafter which is (or if done during the subsistence of the registration, would have been) an infringement of the registration is not an infringement of the copyright, under the Copyright Act, in the artistic work concerned. Moreover, any act done after the expiry of the registration which, if done during its subsistence, would have been an infringement of any registration (based on the same artistic work) which the author could possibly have effected if he had been so minded, is not an infringement of the copyright in the artistic work concerned.

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[17] Section 10.

If the author exploits his work by selling articles to which a corresponding design has been applied industrially but does not register the corresponding design, then his position, during the fifteen years after the first sale, so far as modification to his copyright are concerned, is much the same as if he had registered the corresponding design. After the end of the fifteen years his position changes in much the same way as it would have changed upon the expiry of his registration if he had registered the design. The new Act makes certain amendments to the Registered Designs Act, but these do not fall for consideration in this paper.

### NEW LAMP FOR OLD

I have touched on a few of the principal changes effected by the Act. It is a disappointing Act since a great opportunity has been lost. The reform of the law relating to literature and the arts for the first time in forty years might and should have been used as an encouragement and incentive to the arts and their exponents. The field in which encouragement could have been given was substantial. The long-awaited tax relief to an author who sells his copyright would not, I think, have ruined the National Exchequer. We could have been blessed with a clarification of the present ridiculous laws of obscenity whereby any one who writes a sentence which can corrupt persons capable of being corrupted is deemed to be a pornographer. The author who is in employment and who may produce works of genius pursuant to his employment need not thereby have lost the full benefit in them—a position now perpetuated by this new Act. I do not believe that this present statute will emulate its predecessor by remaining substantially unchanged for forty-six years—and I sincerely hope that some changes will follow rapidly.

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# SHIPPING LAW REVISION

### E. R. Hardy-Ivamy

No substantial revision of Shipping Law in this country has been carried out for a considerable time. In this paper possible lines on which legislation might be desirable are selected in the field of both statute law and common law. In the latter the questions of 'the scope of the contract voyage' and 'deviation' have been chosen as being the most important matters at the present time.

## THE NEED FOR A CONSOLIDATING STATUTE

No general Act consolidating the statute law relating to shipping has been passed since the Merchant Shipping Act, 1894.[1] Indeed, in the second edition of Halsbury's *Statutes of England* no fewer than seventy-three statutes are listed under the title of 'Shipping and Navigation.'[2] This edition states the law to December 31, 1949, but since that date a further seven statutes have been enacted.[3] It has been said that 'except for the Finance Acts the Merchant Shipping Acts probably comprise the most complicated body of legislation devoted to a single subject-matter.'[4] Since its appointment in 1947 the Statute Law Committee[5] has done valuable work in paving the way for the consolidation of enactments in many branches of the law, *e.g.*, the Shops Act, 1950, the Customs and Excise Act, 1952, the Income Tax Act, 1952, the Licensing Act, 1953, and the Food and Drugs Act, 1955. Surely the time has come for an attempt to be made to restate the statutory provisions relating to merchant shipping. It is not suggested, however, that use can be made of the machinery of the Consolidation of Enactments (Procedure) Act, 1949; a more thorough overhaul would appear to be necessary, for in some of the statutes considerable changes might be required.[6] Amendments which might be considered relate to the Bills of Lading Act, 1855, the Merchant Shipping Act, 1894, and the Carriage of Goods by Sea Act, 1924.

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[1] The Act of 1894 consolidated 44 Statutes.

[2] Vol. 23, p. 323.

[3] Halsbury's *Statutes of England, Cumulative Supplement,* 1956, p. 1397.

[4] Temperley's *Merchant Shipping Acts* (5th ed., 1954), Preface, p. v.

[5] See generally 'Statute Law Revision and Consolidation,' by the present writer, 17 *The Solicitor* (1950), p. 103.

### THE BILLS OF LADING ACT, 1855

The primary purpose of the Bills of Lading Act, 1855, was to enable the transferee of a bill of lading to sue for a breach of contract in his own name and also to be sued upon it. Doubts have arisen as to what liabilities are transferred to the transferee, and also what bills of lading are included in the operation of the Act.

Section 1 states: 'Every consignee of goods named in a bill of lading . . . shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.' Although the question of its interpretation did not directly arise in *Ministry of Food* v. *Lamport & Holt Line Ltd.*,[7] Sellers, J. (as he then was), observed: 'It does not appear to have been decided whether this section operates to transfer all the liabilities of the shipper whether incurred before or at the time of shipment or before indorsement of the bill of lading. Nearly 100 years have elapsed without a decision on the point . . . and as far as this case is concerned the interesting point must go undecided and the views expressed in the textbooks must remain the guide.'[8] It might be argued that the consignee would be liable for damage caused by the shipment of dangerous goods by the shipper.[9] Whether this is really intended should be clearly laid down in any new legislation. Further, it is not settled whether the shipowner can look to the consignee for the payment of advance freight if this has not been paid by the shipper.[10]

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[6] It would seem that special care to preserve the language of the present Acts should be observed: *cf.* the fate of the original Merchant Shipping Bill in 1893. 'When the Merchant Shipping Bill was first introduced into the House of Commons in 1893, it was found that the draftsman, in his passion for symmetry and elegance, had made changes of the most sweeping description in the language of the Acts, which when much labour had been spent on examining them, were too frequently discovered to have effected, without meaning to do so, substantial changes in the law. By the direction of the Joint Committee of the two Houses to whom the Bill was referred the original language of the Statutes consolidated was, as far as possible, restored' (T. E. Scrutton, *The Merchant Shipping Act, 1894* (1895), Preface, p. v).

[7] [1952] 2 Lloyd's Rep. 371.

[8] At p. 382.

[9] *Bamfield* v. *Goole* [1910] 2 K.B. 94. See 'The Carriage of Dangerous Goods by Sea,' by the present writer, 20 *The Solicitor* (1953), p. 59.

No definition of a bill of lading is given in the Act, but section 3 refers to 'every bill of lading . . . representing goods to have been shipped on board,' being conclusive evidence of such shipment against the master or other persons signing the same. In *The Marlborough Hill*[11] the Privy Council held that a 'received for shipment bill' was a bill of lading within the meaning of the Admiralty Jurisdiction Act, 1861, s. 6, but in *Diamond Alkali Export Corporation* v. *Bourgeois*[12] McCardie, J., considered that no assignee of a bill of lading could invoke the benefits of section 3 of the Bills of Lading Act, 1855, unless the document actually asserted the goods to have been shipped on board.

Further, when the Act of 1855 was passed, the practice of using 'through bills of lading'[13] covering transit by land and sea had not yet arisen. It would appear that no consignee named in such a bill can claim the protection of the Act. This seems a serious disadvantage under the present law.

### THE MERCHANT SHIPPING ACT, 1894

The important question of the right of a shipowner to limit his liability is to be considered at an International Conference in 1957,[14] and this may lead to the need for new legislation on this matter. The correlation of this right and the use of the maritime lien was discussed by Scott, L.J., in *The Tolten*[15]: 'Both rules were adopted from the customs of merchants (which term then included shipowners) in whose usage they had been applied as measures of public policy for the encouragement of sea commerce. The first object was to bring within foreseeable and moderate limits the risks to be undertaken by the shipowner when he adventured his ship on a commercial enterprise. The means adopted was to keep his financial liabilities within the ambit of his *fortune de mer,* consisting of ship and freight at risk on the voyage.' The method provided by the Merchant Shipping Act, 1894, s. 503, is that, if there has been loss of life or personal injury either alone or together with loss or damage to the vessel or goods, the shipowner can limit his liability[16] to £15[17] for each ton of the ship's tonnage.[18] If a vessel or goods are lost or damaged, whether there be, in addition, loss of life or personal injury, the maximum liability is £8 per ton.[19]

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[10] The original shipper remains liable for the payment of freight: Bills of Lading Act, 1855, s. 2.

[11] [1921] 1 A.C. 444.

[12] [1921] 3 K.B. 443 at 450, 452.

[13] *Hiram Walker & Sons Ltd.* v. *Dover Navigation Co., Ltd.* (1950) 83 Ll.L.R. 84; for the position in American law, see Knauth, *Ocean Bills of Lading* (4th ed., 1953), pp. 12, 141.

[14] See Oral Answers to Questions—*Parl. Deb., Official Report,* House of Commons, December 5, 1956, Vol. 561, col. 1226.

[15] [1946] P. 135 at 140.

These sums appear to be too low at the present time in view of the fall in the value of money, and a change to allow for this might be desirable. At the same time it is to be borne in mind that if this were done, insurance premiums might be raised with a consequent rise in freights, to the general disadvantage of shippers. In *The Victoria*[20] it was held that if the amount of £15 is not sufficient to pay the claims for loss of life and personal injury and loss of goods, the claimants for loss of life, etc., must first be paid £7 per ton and then rank *pari passu* with the other claimants against the balance of £8 per ton. This result, however, cannot be spelt out of the words of the statute, and clearer legislation would appear to be required. The shipowner cannot limit his liability unless the loss has occurred 'without his fault or privity'[1] and litigation has been frequent on this matter.[2] Difficulties have arisen where the owners are a corporation. Must there be fault or privity on the part of the whole board of directors,[3] or of somebody for whom the company is liable because his action is the very action of the company itself,[4] or of the person with whom the chief management of the company's

[16] For the procedure in a limitation action, see R.S.C. Ord. LV H.

[17] Section 503 (1) (i).

[18] Calculated in accordance with the Merchant Shipping Act, 1894, ss. 77–88 and Scheds. 2 and 6 as amended by later Acts, *e.g.,* Merchant Shipping Act, 1954, s. 1.

[19] Merchant Shipping Act, 1894, s. 503 (1) (ii). He cannot limit his liability in respect of the cost of removing a wreck: *The Stonedale No. 1 (Owners)* v. *Manchester Ship Canal Co.* [1956] A.C. 1.

[20] (1888) 13 P.D. 125. See also Merchant Shipping Act, 1894, s. 504, and *The Khedive* (1882) 7 App.Cas. 795.

[1] Merchant Shipping Act, 1894, s. 503 (1).

[2] Recent cases include *The Truculent* [1952] P. 1; *The Hans Hoth* [1953] 1 All E.R. 218; *The Empire Jamaica* [1956] 2 Lloyd's Rep. 119, H.L.; *Alsey Steam Fishing Co.* v. *Hillman (Owners): The Kirknes* [1957] 2 W.L.R. 20.

[3] *Smitton* v. *Orient S.N. Co.* (1907) 12 Com.Cas. 270 at 277.

[4] *Lennard's Carrying Co.* v. *Asiatic Petroleum Co.* [1915] A.C. 705; *Paterson Steamships Ltd.* v. *Robin Hood Mills Ltd.* (1937) 58 Ll.L.R. 33, P.C.

business resides?[5] Any new legislation should incorporate an appropriate definition on this point.

A detailed procedure is laid down by the Merchant Shipping Act, 1894,[6] for the investigation of shipping casualties, but the provision regarding jurisdiction[7] might be brought into line with similar provisions in the Civil Aviation Act, 1949,[8] which state that the Minister can make rules[9] for the investigation of any accident arising out of or in the course of air navigation and either occurring in or over the United Kingdom or occurring elsewhere to British aircraft registered in the United Kingdom. For this purpose any reference to the United Kingdom or other country includes its territorial waters.[10] A further amendment might be made in the case of section 469 relating to the right of the Minister of Transport and Civil Aviation to suspend a master's certificate if it is shown that 'he has been convicted of any offence.' Should this relate to any offence or only one under the Merchant Shipping Act?[11]

Sections 493–502 of the Merchant Shipping Act, 1894, relate to the discharge and warehousing of goods imported into the United Kingdom. Section 493 gives power to a shipowner to cause goods to be landed at the time stated in the charterparty or bill of lading, or if no time is stated, after the expiration of seventy-two hours excluding Sundays and holidays from the time of the report of the ship. Section 494, however, enables him to preserve his lien over them if he gives an appropriate notice to a warehouseman with whom he stores them. It seems unsettled whether section 494 is subject to the provisions of section 493, but in *Smailes* v. *Dessen*[12] Channell, J., considered that a shipowner had no right to land the goods, unless it was apparent that the consignee could not take delivery of them within the demurrage days. Another point requiring clarification in any new legislation is that relating to the question whether, if goods are deposited in a warehouse, the shipowner is responsible under the Act for seeing that the goods are afterwards rightly delivered to the consignee.[13]

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[5] *The Truculent* [1952] P. 1.

[6] Sections 464–79. See generally 'The Investigation of Shipping Casualties,' by the present writer, 21 *The Solicitor* (1954), p. 193. For recent cases, see *The Princess Victoria* [1953] 2 Lloyd's Rep. 619; *The Corchester* [1956] 3 All E.R. 878.

[7] Merchant Shipping Act, 1894, s. 464.

[8] Civil Aviation Act, 1949, s. 10.

[9] Civil Aviation (Investigation of Accidents) Regulations, 1951: S.I. 1951, No. 1653.

[10] Civil Aviation Act, 1949, s. 63 (5). *Cf. The Fulham* [1898] P. 206 as to the meaning of 'near the coasts' for the purpose of the Merchant Shipping Act, 1894, s. 546.

[11] *Cf.* the Scottish case of *Board of Trade* v. *Leith Local Marine Board* (1896) 24 R. 117.

[12] (1906) 11 Com.Cas. 74; 12 Com.Cas. 117, C.A. The judgment of Channell, J., on this point was neither approved nor dissented from by the Court of Appeal.

The statutory provisions in the Merchant Shipping Act, 1894, relating to the carriage of dangerous goods[14] might well be extended by incorporating the corresponding terms to be found in the Carriage of Goods by Sea Act, 1924.[15] Under the Act of 1894 the master can throw dangerous goods overboard without being liable civilly or criminally.[16] By the Act of 1924 he may land, destroy or render them innocuous at any time before discharge.[17] The terms of the Merchant Shipping (Safety Convention) Act, 1949, s. 23, relating to this matter might also be brought within such an extension.[18]

The owner of a British seagoing ship is not liable for any loss or damage to any goods happening without his actual fault or privity if they are lost or damaged by reason of fire on board the ship.[19] New legislation might well incorporate the effect of judicial decisions interpreting this provision. Thus damage caused by fire and water which is used in extinguishing a fire is damage 'by reason of' fire within the meaning of the Act.[20] If goods are heated on board ship and are discharged into lighters where a fire breaks out, the fire is deemed to have started on board the ship and the shipowner is protected.[1] Further, no liability will ensue even if the ship was unseaworthy[2] unless the unseaworthiness was not without the actual fault or privity of the owner.[3] The shipowner can make a claim for a general average contribution in respect of expenditure incurred by him as a result of a fire by relying on the terms of the Act, in the same way as he can rely on the exceptions in a bill of lading.[4] He himself will be liable for a general average contribution if goods are damaged by water used in extinguishing a fire.[5]

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[13] *Glyn* v. *East and West India Dock Co.* (1882) 7 A.C. 591; (1880) 6 Q.B.D. 475 at 486 (*per* Brett, L.J.); *cf. ibid.*, at p. 506 (*per* Baggallay, L.J.).

[14] Sections 446–50.

[15] Art. IV, r. 6.

[16] Merchant Shipping Act, 1894, s. 448.

[17] Art. IV, r. 6.

[18] The Merchant Shipping (Dangerous Goods) Rules, 1952 (S.I., No. 1977) have been made under the powers given by this section. See generally 'The Carriage of Dangerous Goods by Sea,' by the present writer, 20 *The Solicitor* (1953), p. 59. Recent cases on the shipment of dangerous goods include: *Shaw Savill & Albion Co., Ltd.* v. *Electric Reduction Sales Co., Ltd.*; *The Mahia* [1955] 1 Lloyd's Rep. 264; and *Chandris* v. *Isbrandtsen-Moller Co. Inc.* [1951] 1 K.B. 240.

[19] Merchant Shipping Act, 1894, s. 502.

[20] *The Diamond* [1906] P. 282.

[1] *Tempus Shipping Co.* v. *Louis Dreyfus* [1930] 1 K.B. 699.

[2] *Virginia Carolina Chemical Co.* v. *Norfolk & North American S.S. Co.* [1912] 1 K.B. 229, C.A.

Recent international conventions have resulted in the passing of various statutes and these might well be included in any general consolidation of the Merchant Shipping Acts. The Merchant Shipping Act, 1894, s. 424, empowers Her Majesty in Council to pass collision regulations and new ones came into force on January 1, 1954,[6] to give effect to the International Regulations for Preventing Collisions at Sea which were agreed on in 1948 by the principal maritime nations of the world.[7] It is submitted that the text of the Regulations might well form a schedule to the Act itself. Other conventions[8] were signed in Brussels in 1952 relating to the arrest of vessels, civil jurisdiction and penal jurisdiction in cases of collision, and effect has now been given to them by the Administration of Justice Act, 1956.[9]

## THE CARRIAGE OF GOODS BY SEA ACT, 1924

Differences of opinion have been expressed as to the difficulties of construction of the provisions of the Carriage of Goods by Sea Act, 1924. Lord Wright has stated that 'it has generally been considered that the Act has worked well.'[10] In the Preface to the latest edition of Scrutton on *Charterparties,* McNair, J., considers that the Statute is perhaps the most uncertain of the subjects discussed in the book.[11] Colinvaux in his work on *The Carriage of Goods by Sea Act, 1924* goes so far as to say that the Act puts the law 'into confusion indefinitely. Now, nearly thirty years later, every month sees some new and insoluble problem arising under it.'[12]

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[3] *Lennard's Carrying Co., Ltd.* v. *Asiatic Petroleum Co., Ltd.* [1915] A.C. 705.

[4] *Louis Dreyfus* v. *Tempus Shipping Co.* [1931] A.C. 726.

[5] *Greenshields Cowie & Co.* v. *Stephens* [1908] A.C. 431.

[6] Collision Regulations (Ships and Seaplanes on the Water) and Signals of Distress (Ships) Order, 1953 (S.I., No. 1557).

[7] Cmd. 8901.

[8] Cmd. 8954.

[9] Sections 1–8: for the interpretation of s. 3 (4), see *Schwarz & Co. (Grain) Ltd.* v. *St. Elefterio ex Apion (Owners): The Elefterio* [1957] 2 W.L.R. 935.

[10] *Legal Essays and Addresses* (1939), p. 279.

[11] p. viii.

One of the most important Articles of the Schedule to the Carriage of Goods by Sea Act, 1924, is Article II, but its true interpretation seems to be a matter of doubt. It provides that: 'Subject to the provisions of Article VI under every contract of carriage of goods by sea the carrier in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.' This Article was of crucial significance in *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.*[13] Here a fire tender was to be delivered f.o.b. London and while it was being lifted on to the vessel and before it crossed the ship's rail, it was dropped and damaged. The damage amounted to £966 but the shipowners maintained that the Rules of the Carriage of Goods by Sea Act applied and they could limit their liability accordingly. The question therefore was when did the Rules start to apply? Three views can be advanced: (1) The carrier was liable for the whole of the loading, and therefore could claim immunity. This view is consistent with Article III, Rule 2, which states: 'The carrier shall properly and carefully load,' and has the merit of certainty. This interpretation, however, would be 'a new idea to English lawyers though perhaps more revolutionary in theory than in practice.'[14] (2) The carrier is only responsible for that part of the operation which takes place on the ship's side of the ship's rail. This view is supported by Article I (e) which defines 'carriage of goods' as covering 'the period from the time when the goods are loaded on to the time when they are discharged from the ship,' and 'on' may have the same meaning as 'free on board' in contracts relating to the sale of goods where the seller's duties are at an end when this stage is reached.[15] But 'only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo swings at the end of a derrick across a notional perpendicular projecting from the ship's rail.'[16] Further, 'discharging' was held not to end at the ship's rail in *Goodwin Ferreira & Co., Ltd.* v. *Lamport & Holt Ltd.*,[17] so by parity of reasoning 'loading' should not begin at the ship's rail. (3) The carrier is free to determine by the contract with the other party which part each has to play in the loading.[18] This view was adopted by Devlin, J., in the *Pyrene* case,[19] but it may be argued that this does violence to the language of the Rules; for a carrier could thus escape all liability, even for bad stowage, but this surely was not the intention of the legislature.[20]

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[12] *The Carriage of Goods by Sea Act, 1924* (1954), p. v.

[13] [1954] 2 Q.B. 402.

[14] At p. 417.

[15] *J. & J. Cunningham Ltd.* v. *Robert A. Munro & Co., Ltd.* (1922) 28 Com.Cas. 42. See further 'Revision of the Sale of Goods Act,' by the present writer, 9 *Current Legal Problems* (1956), p. 113, at p. 124.

Another important problem requiring clarification is that of the meaning of Article IV, Rule 4, which states: 'Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement of these Rules or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom.' This is supported by Article III, Rule 8, which provides: 'Any clause . . . relieving the carrier . . . from liability or loss . . . arising from . . . fault or failure in the duties and obligations provided in this Article . . . shall be null and void and of no effect.'

There seem to be three possible interpretations of this Article: (1) that any 'deviation' or 'liberty to call' clause which is wider than that contained in the Rules is void, and except for this no deviation must be made from the ordinary geographical route between the ports of departure and destination; (2) that the bill of lading can define the contractual route in whatever way the parties wish, but they cannot rely on any 'liberty' clause which is wider than the Rules state; and (3) that these liberties specified in the Article are additional to any stated in the bill of lading. The third view is supported by the words of Jenkins, L.J., in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama*,[1] 'I think that Rule 4 should be construed merely as giving an additional protection to shipowners and not as imposing by implication an additional reduction in an Article expressed to relate to "Rights and Immunities." It may have been inserted *ex abundanti cautela* to ensure that shipowners should not be deprived of any of the immunities given by the Article by reason of any deviation of any of the kinds mentioned in Rule 4.'[2]

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[16] *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402 at 419.

[17] (1929) 34 Ll.L.R. 192.

[18] *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402 at 418.

[19] *ibid.*

[20] Scrutton on Charterparties (16th ed., 1955), p. 472. But in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama* [1956] 3 All E.R. 957 at 966, Lord Morton approved of the construction adopted by Devlin, J., and considered that it was the more natural construction of the language used.

[1] [1956] 1 Q.B. 462 at 505. See also the judgment of Hodson, L.J., at p. 510.

Article III, Rule 8, refers to 'loss or damage to or in connection with goods,' and this too is capable of bearing more than one meaning. Does this refer to physical loss or damage or can a claim be made in respect of other loss or damage? Support for the first meaning can be found in the judgment of Atkinson, J., in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine S.S. Line Ltd.*,[3] but the House of Lords has now decided in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama*[4] that this view gives no meaning to the words 'or in connection with,' and therefore the second view is the correct one. Perhaps the Rule could be redrafted to make the matter clear.

Article III, Rule 2, provides: 'Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.' It might be thought that the words 'properly and carefully' relate only to the manner and method of carriage, for example the carriage of perishables in a refrigerated hold and at proper temperatures. But they can go further than this, for in *Gosse Millard* v. *Canadian Government Merchant Marine Ltd.*,[5] Wright, J., considered that the words 'properly discharge' meant 'deliver from the ship's tackle in the same apparent order and condition as on shipment unless the carrier can excuse himself under Article IV.' In *G. H. Renton & Co., Ltd.* v. *Palmyra*

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[2] On appeal to the House of Lords [1956] 3 All E.R. 957 their Lordships declined to express their views on the interpretation of Article IV, r. 4.

[3] (1940) 66 Ll.L.R. 147 at 165. See also the judgment of Lord Maugham in the House of Lords: *Joseph Constantine S.S. Line Ltd.* v. *Imperial Smelting Corporation Ltd.* [1942] A.C. 154 at 175.

[4] *loc. cit., supra*, n. 2. The Court of Appeal declined to express an opinion on this matter. In *Anglo-Saxon Petroleum Co., Ltd.* v. *Adamastos Shipping Co., Ltd.* [1957] 1 All E.R. 673, Devlin, J., considered that the character of the compensation claimed must bear some relation to the goods and that relation must not be too remote. This decision was, however, reversed on another point, [1957] 2 W.L.R. 968, C.A.

[5] [1927] 2 K.B. 432 at 434.

*Trading Corporation of Panama,*[6] which concerned the question whether a shipowner who had issued a bill of lading for a named port of discharge, could modify his obligation to deliver the goods there and deliver at another port by relying on a clause in the bill of lading giving him power to do so, if there were a strike at the named port. McNair, J., considered that such a clause was void under the Rules, because it was implied that the discharge should take place at the 'proper port.' This decision, however, was reversed by the Court of Appeal,[7] which considered that the language of the Rule was apt to refer to the proper conduct of discharging rather than to the place at which or voyage on which those operations were to be conducted. Singleton, L.J.,[8] said that the word 'properly' in the Rule was the translation of the words in the French text of the Convention[9] on which the Act was founded, *de façon appropriée,* which indicated that each of the operations must be carried out in a proper manner and with reasonable care. A similar interpretation was adopted by the House of Lords.[10]

### THE SCOPE OF THE CONTRACT VOYAGE

The object of the carriage of goods from port to port is that they may be sold or otherwise dealt with at the place of destination; and the person who wants them at the place for sale or use acts upon the assumption that they will arrive there at or about a certain time in the ordinary course of a voyage from the port of shipment.[11]

It is the duty of a ship, at any rate, when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence to the contrary be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons.[12] Thus in *James Morrison & Co., Ltd.* v. *Shaw Savill & Albion Co., Ltd.*[13] Phillimore, L.J., observed[14]: 'There are many similar instances such as calling at weather stations to inquire about ice, or going to some station for a Government pass through territorial waters, or to pick up a pilot or calling at a preliminary port to lighten the ship in order that she may finish the voyage with less draught. These are not, in my view, departures from the usual and customary course of the voyage.'

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[6] [1955] 1 Q.B. 430.
[7] [1956] 1 Q.B. 462 at 478.
[8] At p. 497.
[9] U.K. Treaty Series, No. 17 (1931).
[10] [1956] 3 All E.R. 957.
[11] *Reardon Smith Line Ltd.* v. *Black Sea & Baltic Insurance Co., Ltd.* [1939] A.C. 562.
[12] *ibid.*
[13] [1916] 2 K.B. 783.
[14] At p. 797.

Evidence may always be given to show what the usual route is unless a specific route be prescribed by the charterparty or bill of lading.[15] Sometimes there may be more than one usual route. Further, a route may become a usual route in the case of a particular line though that line is accustomed to follow a course which is not that adopted by the vessels belonging to other lines or to other individuals. It is sufficient if there is a well-known practice of that line to call at a particular port. It is not necessary to prove a custom in the strict sense. Even a short usage may still be a sufficient one to create a usual route.[16]

In the modern forms of charterparty liberties to depart from the geographical or usual route are often given, but the courts construe these clauses strictly.

A clause sometimes found is 'liberty to call at any ports in any order.' In *Leduc* v. *Ward*[17] the contract voyage was from Fiume to Dunkirk and the bill of lading contained such a clause. The vessel was lost off the Clyde after calling at Glasgow which was 1,200 miles out of the ordinary course of the voyage. The Court of Appeal held that the shipowners had broken the contract. Lord Esher, M.R., considered that the term could have but one meaning, *viz.*, that the ports, liberty to call at which was intended to be given, must be ports which were substantially ports that would be passed on the normal voyage. In *Glynn* v. *Margetson & Co.*[18] a printed liberty clause in a bill of lading relating to the carriage of oranges from Malaga to Liverpool was held to be restricted to ports which were in the course of the voyage, and must not be construed so as to defeat the main object and intent of the contract.

The word 'intermediate port' was given a similar meaning in

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[15] See generally *Evans* v. *Cunard S.S. Co.* (1902) 18 T.L.R. 374; *Frenkel* v. *MacAndrews* [1929] A.C. 545; *Reardon Smith Line Ltd.* v. *Black Sea & Baltic Insurance Co., Ltd.* [1939] A.C. 562.

[16] *Reardon Smith Line Ltd.* v. *Black Sea & Baltic Insurance Co., Ltd.* [1939] A.C. 562.

[17] (1888) 20 Q.B.D. 475.

[18] [1893] A.C. 351.

*James Morrison & Co., Ltd.* v. *Shaw Savill & Albion Co., Ltd.*[19] Swinfen Eady, L.J., said that in construing the document all the surrounding circumstances must be taken into consideration: the size and class of the ship, the nature of the voyage, the usual and customary course, the natural or usual ports of call, the nature and position of the port in question.[20]

Liberty is sometimes given 'to tow and assist,'[1] 'to deviate in case of *force majeure*,'[2] or 'to carry goods beyond the port of destination.'[3]

It must be emphasised that the types of cases considered above concern contracts in which one of the parties has been given a power that, if construed literally, would in effect enable that party to nullify the contract at will. This must be distinguished from a special provision stating what the rights and obligations of the parties are to be in the event of obstacles beyond the control of either arising to prevent or impede the performance of the contract in accordance with its terms.[4] Thus, in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama*,[5] the House of Lords held that a 'strike clause' permitting the shipowner to discharge a cargo at the port of loading or any other safe and convenient port[6] did not conflict with the main object of the contract which was to discharge at a named port, and must be upheld.

Most of the foregoing cases might perhaps be considered as attempts of shipowners to keep a free hand over the working of their vessels after goods have been shipped which have been foiled by the vigilance of the courts. But in *Frenkel* v. *MacAndrews*[7] Lord Sumner indicated that the parties might by apt words contract themselves out of *Glynn* v. *Margetson & Co.*[8] and make the liberty to deviate control the terms of the described voyage.

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[19] [1916] 2 K.B. 783.

[20] At p. 795.

[1] *Stuart* v. *British & African S.N. Co.* (1875) 32 L.T. 257.

[2] *Yrazu* v. *Astral Shipping Co.* (1904) 9 Com.Cas. 100.

[3] *Sargant* v. *East Asiatic Co.* (1915) 21 Com.Cas. 344; *Broken Hill Co.* v. *P. & O.* [1917] 1 K.B. 688; *Cunard S.S. Co.* v. *Buerger* [1927] A.C. 1.

[4] *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama* [1956] 1 Q.B. 462, C.A., *per* Jenkins, L.J., at p. 502. This view was approved by Viscount Kilmuir, L.C. [1956] 3 All E.R. 957 at 960.

[5] [1956] 3 All E.R. 957.

[6] See also *Associated Lead Manufacturers Ltd.* v. *Ellerman & Bucknall S.S. Co., Ltd.* [1956] 2 Lloyd's Rep. 167.

[7] [1929] A.C. 545 at 564.

[8] [1893] A.C. 351.

A step forward on these lines was taken in *Connolly Shaw Ltd.* v. *A/S Det Nordenfjeldske D/S*[9] where the clause read: 'Nothing in this bill of lading (whether written or printed) is to be read as an engagement that the said carriage shall be performed directly or without delays, the ship is to be at liberty either before or after proceeding towards the port of delivery of the said goods to proceed to or return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any order backwards or forwards for loading or discharging cargo . . . or for any purpose whatsoever . . . and all such ports places and sailings shall be deemed included within the intended voyage of the said goods.' Branson, J., considered that in so far as the liberty which had been reserved could be used without frustrating the contract then there was no reason for disregarding it in construing the contract. There was no authority for the proposition that one should disregard it altogether. But in this particular case, which concerned the carriage of lemons, the object was not frustrated so the clause was valid, for a delay of three days only had occurred through a deviation and did not affect their market value.

The question, however, might arise in a more general way, if the cargo was of a non-perishable nature. Might it not be said that with such a clause as this the voyage might be so extended as to include a voyage of circumnavigation repeated many times over? Perhaps the time has come for legislation to forbid a clause of this kind—possibly by an amendment to Article IV, Rule 2, of the Carriage of Goods by Sea Act, 1924. It might, of course, be said, on the other hand, that in some cases a shipper gets some business advantage by not having the ship upon which he is putting his goods too closely tied in the matter of its subsequent movements by reason of the fact that that enables him to get his goods carried at a lesser freight than he would have to pay if the ship were bound too strictly as to how it should conduct its voyage to the port of discharge.[10]

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[9] (1934) 49 Ll.L.R. 183. A similar clause is to be found in *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama* [1956] 3 All E.R. 957, H.L. On reading the clause set out above one is perhaps reminded of a passage in the judgment of Birkett, L.J., in *Stafford Allen & Sons Ltd.* v. *Pacific S.N. Co.* [1956] 1 W.L.R. 629 at 635, where he considered the drafting of an exception clause in a bill of lading: 'The immunity clause in the bill of lading is really a work of art. One begins to wonder how on earth any cargo can get from one port to another without coming within that clause, because heat of holds, snow, rain, fresh water and sea water and every conceivable thing that the wit of man can imagine are included in the clause. If that immunity clause remained in full force and virtue, it is a very fine weapon of defence.'

## DEVIATION

Most of the main principles relating to the question of deviation have been settled by judicial decisions, but some doubtful points could be cleared up by new legislation.

Thus it has been established that a deviation is justifiable to save life[11] or to avoid danger,[12] provided the danger is of a more than temporary nature.[13] At common law the master has no right to deviate to save property,[14] but such a right is given by the Carriage of Goods by Sea Act, 1924, in the cases to which it applies.[15] Deviation is allowed to save the ship even though the danger to be avoided results from unseaworthiness.[16]

If a vessel deviates unjustifiably, it is open to the party not in default to treat the contract as at an end or to waive the breach and treat it as subsisting.[17] If he does this with knowledge of his rights, he must in accordance with the general law of contract be held bound. In this event the shipowner can rely on the exception clauses in the charterparty.[18]

But what is the position if the party not in default does not waive the breach? In *James Morrison & Co., Ltd.* v. *Shaw Savill & Albion Co., Ltd.*[19] the Court of Appeal considered that the special contract was abrogated and that the shipowner would be liable as a common carrier unless he could prove that (1) the loss happened owing to Act of God, the Queen's enemies or inherent vice, and (2) the loss would have occurred in any event. However, in *Hain S.S. Co., Ltd.* v. *Tate & Lyle Ltd.*[20] Lord Wright considered that the shipowner may not have even the right to the common law exceptions accorded to a common carrier. This matter could be laid down clearly in new legislation.

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[10] See the remarks of Bigham, J., in *Hadji Ali Akbar & Sons Ltd.* v. *The Anglo-Arabian & Persian S.S. Co., Ltd.* (1906) 11 Com.Cas. 219 at 226.

[11] *Scaramanga* v. *Stamp* (1880) 4 C.P.D. 316.

[12] *The Rona* (1884) 51 L.T. 28.

[13] *Hand* v. *Baynes* (1839) 4 Whart. 204.

[14] *Scaramanga* v. *Stamp* (1880) 4 C.P.D. 316.

[15] Art. IV, r. 4.

[16] *Monarch S.S. Co.* v. *Karlshamns Oljefabriker (A/B)* [1949] A.C. 196.

[17] *Hain S.S. Co., Ltd.* v. *Tate & Lyle Ltd.* (1936) 41 Com.Cas. 350.

[18] *ibid.*, at p. 354.

[19] [1916] 2 K.B. 783.

[20] (1936) 41 Com.Cas. 350 at 361, 369.

Suppose a deviation takes place after a loss has occurred, for which owing to the exception clause, the shipowner would not have been liable? A dictum in *Internationale Guano* v. *MacAndrew*[1] lends support to the view that the shipowner cannot claim the benefit of the exceptions whether the loss takes place before or after the deviation, but in *Hain S.S. Co., Ltd.* v. *Tate & Lyle Ltd.*[2] Lord Maugham considered that the cargo owner only had the right to treat the contract as at an end as from the date of the deviation, *i.e.*, until that time the exception clause would still hold.

If the vessel has deviated but the goods are delivered safely, can the owner still claim freight? This matter is still unsettled, but new legislation could provide the answer. It would appear that the shipowner is not entitled to the amount of freight laid down by the contract, but dicta in some of the cases support the view that he should be paid on a *quantum meruit* basis.[3] Thus in *Hain S.S. Co., Ltd.* v. *Tate & Lyle Ltd.*[4] Lord Wright instanced the hypothetical case of a steamer which deviated by a few hours steaming but duly delivered the goods at the agreed port. No trouble ensued except the trifling delay. The goods owner had had for all practical purposes the benefit of all that his contract required. His Lordship said that he could not help feeling that the court would not be slow to infer an obligation, when the goods were received at their destination, to pay not the contract freight but a reasonable remuneration.

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[1] [1909] 2 K.B. 360.

[2] *ibid.*, at p. 371.

[3] *Joseph Thorley Ltd.* v. *Orchis S.S. Co., Ltd.* [1907] 1 K.B. 660 at 667, 669; *Balian & Sons* v. *Joly, Victoria & Co., Ltd.* (1890) 6 T.L.R. 345.

[4] (1936) 41 Com.Cas. 350 at 368.

## 11

# CENTRIFUGAL TENDENCIES IN AIR LAW

BIN CHENG

THE present paper is a brief study of some of the difficulties in the unification of rules of air law and their proneness, after unification, gradually to drift apart. This problem was discussed at the International Conference on Private Air Law held at The Hague in 1955 which urged that all those interested in the subject should commence its study 'as soon as possible.'[1] In fact, the same phenomenon is to be observed also in other spheres, for instance, maritime law,[2] but it would not be possible here to do more than to bear in mind that many of these centrifugal tendencies in air law are only symptoms of forces exerting themselves on a wide front of international life.

### THE FUNCTION OF UNIFICATION

In order to understand the subject under study, it is essential to know the function and forces of legal unification in the eyes of States. There is no doubt that modern means of communication, including air transport itself, help to bring to the fore any sectional or national divergencies, providing, at the same time, greater opportunities and creating more urgent needs than before for uniformity and standardisation. Thus the British Government in 1954 hesitated to make backward-facing seats a standard requirement of United Kingdom registered aircraft; for, as the then Minister of Transport and Civil Aviation stated, 'until the International Civil Aviation Organisation makes backward-facing seats a standard international requirement, any compulsory provision in British certificates of airworthiness alone would impose competitive penalities on British airlines and might prejudice the sales of our aircraft abroad.'[3] The protection of a national industry and the promotion of the export trade are thus instrumental in this case in bringing about at least negative international uniformity.

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[1] International Civil Aviation Organisation (hereinafter referred to as ICAO), *Final Act of the Conference*, p. 16.

[2] See R. P. Colinvaux (Ed.), *Carver's Carriage of Goods by Sea* (9th ed., 1952), pp. 206 *et seq.*

[3] *Parl. Deb., Official Report*, House of Commons, February 3, 1954, Vol. 523, cols. 351–2. Cf. the adoption of this requirement in Australia (*The Times*, February 4, 1955), where the export of aircraft is not yet a consideration.

In the absence, however, of such, or other equally potent, national interests, States and public opinion in States may be far less inclined to promote international legislative uniformity purely for its own sake. When, for instance, the British Government in 1955, in order to give effect to a Resolution of the Economic and Social Council of the United Nations and to act in concert with fifty-four other States which had already done so, announced that it intended to ban the manufacture of heroin and its export from and import into the United Kingdom, a storm of protest arose. The United Kingdom was then responsible for over 70 per cent of the world production of this drug. *The Times,* in a second leader, said: 'Some more substantial reason is required, as Lord Jowitt said, than a gesture of international solidarity.'[4] The decision to ban its manufacture was subsequently rescinded, at least, for the time being.

Deliberate conformity to an international standard must, therefore, be considered as atypical, unless there are some national interests to be served. Such interests, whether of the State or of its nationals, constitute the most compelling, if not the only real, centripetal force. In other words, international standardisation and uniformity are not generally regarded as ends in themselves but merely instruments of national policy.

While, on the one hand, there are fields where the interests involved are too insignificant for States to seek international regulation, on the other hand, international regulation becomes increasingly more difficult to secure as one approaches nearer and nearer the centre of a State's vital interests, the core of its national sovereignty. Between these two extremes, however, there is doubtless an appreciable zone where the advantages of international regulation outweigh the sacrifices involved in limiting one's own sovereignty. This is shown especially in such matters as international communications,[5] international control of fisheries, of the production and sale of commodities,[6] of the conditions of labour, of pests, drugs, diseases and epidemics, international protection of literary, artistic or industrial property, mutual concessions in trade and reciprocal assistance in the administration of justice and the prevention of certain crimes.

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[4] December 14, 1955.

[5] Whether maritime, river, rail, road, air, postal, telegraphic or telephonic.

[6] Such as wheat, sugar, rubber, coffee, tin, gold, coal and steel.

It is in this context of functional international co-operation that international air transport finds itself. But the importance of functionalism in international organisation must not be exaggerated. It has constantly to be borne in mind that international regulation merely represents for States an extension of their own national interests and policy.[7]

All these help to explain the relatively early establishment of regional international arrangements in the history of international civil aviation, as compared with other forms of transport.[8] Indeed, when the Second World War dramatically demonstrated the capabilities of aeronautics, the Chicago Conference on International Civil Aviation was convened even before the war ended and the International Civil Aviation Organisation was soon established.[9] Moreover, an imposing number of States are parties to the Warsaw Convention of 1929 unifying rules relating to documents of carriage and the carrier's liability in international carriage by air,[10] as well as to the various international sanitary regulations in this sphere.[11]

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[7] *Cf.* G. Schwarzenberger, *Power Politics*, 1951, pp. 565 *et seq.*

[8] *e.g.*, Paris Convention on the Regulation of Aerial Navigation, 1919 (Hudson, 1 *Int. Leg.*, p. 359), Spanish-American Convention on Aerial Navigation, Madrid, 1926 (3 *ibid.*, p. 2019), Havana Convention on Commercial Aviation, 1928 (4 *ibid.*, p. 2354), Bucharest Convention on Air Navigation between the States of the Balkan Entente, 1936 (7 *ibid.*, p. 219).

[9] See U.S. Department of State, *Proceedings of the International Civil Aviation Conference, November 1–December 7, 1944* (hereinafter *Proceedings*), 1948. The Chicago Convention entered into force on April 4, 1947.

[10] Hudson, 5 *Int. Leg.*, p. 100. The provisions of this Convention have been incorporated into English law as the First Schedule to the Carriage by Air Act, 1932. It is binding on forty-eight States and continues to receive further accessions and ratifications (see Carriage by Air (Parties to Convention) Orders, 1951–56). A Protocol to amend the Warsaw Convention was adopted at The Hague in 1955 but has not yet received sufficient ratifications to come into force (see the writer's 'Recent Developments in Air Law,' 9 *Current Legal Problems* (1956), p. 208, at pp. 220 *et seq.*).

[11] The Hague Sanitary Convention for Aerial Naviation, 1933 (Hudson, 6 *Int. Leg.*, p. 292), modified by the Washington International Sanitary Convention for Aerial Navigation, 1944 (9 *ibid.*, p. 254), which was prolonged by the Washington Protocol, 1946 (9 *ibid.*, p. 272); International Sanitary Regulations—W.H.O. Regulations No. 2, adopted by the World Health Organisation in 1951 (*W.H.O. techn. Rep. Ser.*, 1951, 41) (Cmnd. 30); Additional Regulations, 1956. See H. S. Gear and Z. Deutschman, *Disease Control and International Travel* (W.H.O., 1956).

But all these matters are politically peripheral. Furthermore, their role in international air transport is merely that of the scenery, costumes and properties on a stage, futile without the right to fly.[12]

### UNBRIDLED SOVEREIGNTY

The greatest centrifugal force in international life is doubtless national sovereignty, inasmuch as sovereignty implies freedom from restraint and States which are sovereign can be induced only with difficulty to limit their freedom of action. A significant illustration is the reduced legislative power of the International Civil Aviation Organisation, as compared with the International Commission for Air Navigation, under the 1919 Paris Convention on the Regulation of Aerial Navigation.[13]

The latter had truly legislative powers. It could amend the Annexes to the Convention, except Annex H, with binding effect on all the members, by a three-fourths majority of the total possible votes which could be cast in the Commission if all the States were present (Article 34 (c)). These Annexes had 'the same effect . . . as the Convention itself' (Article 39). Annexes A–G dealt with various technical matters relating to international aviation,[14] whilst Annex H contained a special agreement dealing with customs (Article 36).

Bearing in mind that the majority principle was the exception rather than the rule in 1919, this step was remarkable in its boldness. It is true that a system of weighted voting existed in favour of the then 'Big Five' (British Empire and Dominions, France, Italy, Japan and the United States) so that together they would always have a majority of one (Article 34). But, as a further demonstration of the accommodating spirit of States in regard to politically peripheral matters, by successive amendments of the Paris Convention, first in 1923,[15] then in 1929,[16] in the procedure of amending the Annexes A–G, the weighting of the votes of the

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[12] See the writer's 'The Right to Fly,' 42 *Grotius Society Transactions* (1956).

[13] Hudson, 1 *Int. Leg.*, p. 359. See A. Roper, *La convention internationale du 13 octobre 1919 portant réglementation de la navigation aérienne*, 1930.

[14] A. Marks; B. Certificates of Airworthiness; C. Log Books; D. Rules of the Air; E. Licences; F. Aeronautical Maps and Guides; G. Meteorological Information.

[15] Hudson, 1 *Int. Leg.*, p. 380.

[16] *Ibid.*, p. 384.

Great Powers was given up and the majority required was reduced from three-fourths of the total possible votes to two-thirds of those present and voting. Moreover, by Resolution No. 463,[17] the Commission affirmed its right not only to amend Annexes A–G, but also to amplify them. In regard to the less peripheral subject of customs, the unanimity principle continued to apply.

Twenty-five years later, at the Chicago Conference of 1944, national sovereignty reared its head even higher than in 1919. It is true that the number of topics which may be regulated by the Annexes to the Chicago Convention is no longer limited (Article 37 (2)). But this apparent advance is more than off-set by Article 38, drafted, together with the other Articles in the same Chapter of the Convention, by one of the delegates of the United States, the President of which a few months later at Yalta was to be instrumental in introducing the veto provision which was eventually incorporated in Article 27 of the United Nations Charter. This Article 38 deprives the international standards and procedures established by the Council of the International Civil Aviation Organisation of 'compulsory force.'[18]

The Council adopts these standards[19] by a two-thirds majority at a meeting called for that purpose and must then submit them to each contracting State.[20] But it would appear that it may amend them by an ordinary majority[21] without a special meeting and may notify such amendments to the contracting States at a later date if it so wishes.[22] These standards and their amendments 'become effective within three months after their submission to the contracting States or at the end of such longer period of time as the Council may prescribe' (Article 90 (*a*)). Before an international standard or an amendment comes into force, a majority of the contracting States may reject it by registering their disapproval with the Council (Article 90 (*a*)). On a standard or an amendment becoming effective, the Council must once again give immediate notification to all the contracting States (Article 90 (*b*)).

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[17] *Official Bulletin*, No. 15, p. 37.

[18] See the Report of Dr. Warner, a United States delegate and the Reporting Delegate of Committee II, on Technical Standards and Procedures, to the Third Plenary Session of the Chicago Conference, 1944 (1 *Proceedings*, p. 92).

[19] Art. 54 (*l*).

[20] Art. 90 (*a*), first sentence.

[21] Art. 52. See further the next footnote.

[22] It appears to be generally assumed that the procedure for the adoption of the standards applies also to the adoption of amendments thereto. See, *e.g.*, C. Parry, 'Constitutions of International Organisations,' 23 B.Y.I.L. (1946), p. 394, at p. 460; J. Schenkman, *International Civil Aviation Organisation*, 1955, p. 262. But the Convention, upon further analysis, does not support this view. The first sentence in Art. 90 (*a*), which establishes the requirements of a two-thirds majority, a special meeting and immediate notification, speaks only of the *adoption* of the Annexes and refers only to Art. 54 (*l*), which again deals only with the *adoption* of the Annexes, but not to Art. 54 (*m*), which deals with their amendment. On the other hand, both the second sentence in Art. 90 (*a*), and Art. 90 (*b*), clearly distinguish between the adoption of the Annexes and their amendment.

In contradistinction to those under the 1919 Paris Convention, international standards under the Chicago Convention are not regarded as an integral part of the Convention. They are designated as Annexes to the Convention merely 'for convenience' (Article 54 (*l*)). It would seem that under Article 38 of the Convention,[23] in the case of an amendment to a standard, a contracting State must notify its contemplated non-compliance with the amendment within sixty days of the adoption of the amendment, even though no notification has yet been received from the Council. But there is no apparent sanction if a State fails to observe this duty.

For it would appear that even after a standard or an amendment has come into force, a State may, at any time, either initially or subsequently, decide not to comply with a part or the whole of such a standard or amendment. Its only obligation consists in giving 'immediate notification to the International Civil Aviation Organisation[24] of the differences between its own practice and that established by the international standard' (Article 38). There is thus no duty under the Convention to comply with an international standard.

On the other hand, it is clear that failure to give immediate notification of a non-compliance is a breach of the Convention. A contracting State would, therefore, be liable to another contracting State if the latter, or one of its nationals, suffers damage as the result of a mistaken belief, induced by the lack of notification, that the former contracting State was complying with a given international standard.[25] Thus indirectly a contracting State is under a legal duty to comply with international standards in force, from which it has not notified any departure in its national legislation.

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[23] Second sentence.

[24] It will be noticed that concerning notification of prospective non-compliance with a newly adopted amendment of a standard (discussed in the previous paragraph), the second sentence of Art. 38 does not speak of the Organisation in general, but specifies that such notification should be addressed to the Council. However, notwithstanding this difference in terminology in the first and second sentences of Art. 38 in regard to two different types of notification, the first ICAO Assembly in its definition of Standards and Recommended Practices, in May, 1947, has also specified the Council as the organ to be notified even in respect of notifications discussed in the present paragraph.

The only exception to this freedom to depart from international standards is in respect of rules of the air over the high seas. Each contracting State undertakes to ensure that aircraft of its registration, when flying over the high seas, shall comply with the rules of the air established by the Organisation (Article 12).

And the only discouragement from such centrifugal tendencies to be found in the Convention is in regard to certificates of airworthiness of aircraft and licences of personnel. Aircraft with certificates, or personnel with licences, which are not in conformity with international standards, 'shall not participate in international navigation, except with the permission of the State or States whose territory is entered' (Article 40).

## ECONOMIC INTERESTS

While the economic interests of a State represent merely part of its sovereignty, they are so important that they merit separate mention. From this point of view, four categories of State interests present special problems: (a) Those States the civil aviation industry of which is only nascent or has to be rebuilt after the war favour strict State control and, if necessary, strict international regulation; (b) Those States the civil aviation industry of which is in a highly competitive position naturally favour the maximum of international *laissez faire et laissez passer;* (c) Those States which, either as points of departure or as points of destination, have air traffic that their own civil aviation industry is not able to carry, regard this as a national asset not to be parted with, without obtaining in return commensurate advantages in the field of civil aviation or in other spheres[26]; (d) Those States which occupy geographically strategic positions along major international air routes also would not grant the right of passage or of landing to aircraft of a foreign State—except in return for compensating benefits.[27]

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[25] See further the writer's *General Principles of Law as applied by International Courts and Tribunals,* 1953, pp. 137 *et seq.,* where on the basis of the *'Blockade' of Portendic* case (1843) between Great Britain and France, the following conclusion was reached: 'If State A has knowingly led State B to believe that it will pursue a certain policy, and State B acts upon this belief, as soon as State A decides to change its policy—although it is at perfect liberty to do so—it is under a duty to inform State B of this proposed change. Failure to do so, when it knows or should have known that State B would continue to act upon this belief, gives rise to a duty to indemnify B for any damage it may incur' (p. 137).

These conflicting interests make any centralised international regulation of international air transport extremely difficult. They account for the repeated failures to draw up satisfactory multilateral agreements and for the many divergencies in the interpretation of those provisions granting transit or traffic rights in those treaties which exist or existed.

Thus, during the period between the two World Wars, the British Empire, the Netherlands, Sweden and the United States, all strong carrier nations, fought a lonely and losing battle in claiming that Article 15 of the Paris Convention of 1919[28] conferred on the regular international air services of a contracting State a right of passage over the territories of the other contracting States.[29] Ultimately, Article 15 was amended in 1929[30] so that scheduled international air services were expressly left to regulation by special agreement between the States concerned.[31]

The same conflict of interests existed at the Chicago Conference[32] and has ever since bedevilled the scene of international air transport. Notwithstanding the attempts at Chicago in

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[26] From this point of view, E. A. Ferreira's *The Capacity Problem under the Argentine Doctrine in International Air Law* (Córdoba, 1952) is very revealing.

[27] See O. J. Lissitzyn, *International Air Transport and National Policy,* 1942, pp. 396–8.

[28] 'Every aircraft of a contracting State has the right to cross the airspace of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

'The establishment of international airways shall be subject to the consent of the States flown over.'

[29] Practical difficulties arose between Great Britain on the one hand and Belgium and Persia on the other hand, and between Poland and Czechoslovakia over a proposed service between Warsaw and Vienna.

[30] 'Every contracting State may make conditional on its prior authorisation the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory.'

[31] For pre-war U.S. bilateral agreements, *cf.* Lissitzyn, *op. cit.,* pp. 312 *et seq.*

[32] See *loc. cit.* in note 12 above.

1944[33] and subsequent efforts[34] to find a satisfactory multilateral solution, scheduled international air services are today regulated essentially by bilateral agreements.[35] The confusion of this cobweb is made more confounded by the complicated system of constant consultation and bargaining between the contracting States to adjust and readjust the routes, rates, capacity and frequency of the agreed services according to a complex combination of bewildering criteria. To crown the scene of this delicately constructed superstructure, practically all the bilateral agreements allow termination at short notice.

The situation is hardly more comforting with regard to such multilateral agreements as exist in relation both to scheduled and non-scheduled international air services. Sharp differences in interpretation soon reveal themselves. Article 5 of the Chicago Convention itself,[36] in relation to non-scheduled flights, is a good example.

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[33] It was originally intended at Chicago to incorporate in the general convention provisions authorising and regulating scheduled international air services, but disagreement between principally the United Kingdom and the United States, especially over the issue of fifth freedom traffic, made this impossible. The matter was dealt with by two separate agreements in addition to the Chicago Convention proper, namely, the International Air Transit Agreement and the International Air Transport Agreement granting respectively the two freedoms and the five freedoms of the air in respect of scheduled international air services. On the two-freedoms Agreement, see P. P. Heller, *The Grant and Exercise of Transit Rights in respect of Scheduled International Air Services*, 1954. Moreover, a standard form of bilateral air transport agreement was included in the Final Act of the Conference. Very few States are parties to the Air Transport Agreement.

[34] The Air Transport Committee of the Provisional International Civil Aviation Organisation prepared a draft multilateral convention on the exchange of commercial rights in scheduled international air transport and presented it to the First Assembly of the ICAO (PICAO Docket 2866, AT/169, 26/2/47). *Cf.* J. C. Cooper, 'The Proposed Multilateral Agreement on Commercial Rights in International Air Transport,' 14 J.A.L.C. (1947), p. 125. The discussions of Commission No. 3 of the First Assembly are printed in Vol. I of its minutes, *Development of a Multilateral Agreement on Commercial Rights in International Civil Air Transport* (Doc. 4510, A1–EC/72), 1947. Agreement not having been reached, a commission of all member States was called at Geneva in 1947. See ICAO, *Records of the Commission on Multilateral Agreement on Commercial Rights in International Civil Air Transport* (Doc. 5230, A2-EC/10), 1948. *Cf.* R. J. G. McClurkin, 'The Geneva Commission on a Multilateral Air Transport Agreement,' 15 J.A.L.C. (1948), p. 39. Agreement again could not be reached.

The matter was taken up on a regional basis at the 1954 Strasbourg Conference on Co-ordination of Air Transport in Europe (Doc. 7575–CATE/1) and at the First Session of the European Civil Aviation Conference, 1955 (Doc. 7676, ECAC/1).

[35] 463 bilateral agreements were registered with the ICAO between January 1, 1946, and December 31, 1954. See *op. cit.* in note 12 above. Some interesting material on European bilateral air transport agreements may be found in European Civil Aviation Conference, *Report of the First Session, 1955* (Doc. 7676, ECAC/1), 1956, pp. 60 *et seq.* See also A. J. Thomas, Jr., *Economic Regulation of Scheduled Air Transport*, 1951, pp. 211 *et seq.*

Apart from the definition of a non-scheduled flight,[37] the most controversial point in this Article is whether, as between the contracting States, the aircraft of a State engaged in non-scheduled flights which intend to exercise the privilege of carrying revenue-traffic in the territory of another State may or may not be required by the latter to seek its prior permission. The Secretariat of the International Civil Aviation Organisation (ICAO), which was instructed by the ICAO Council to analyse this provision, at first believed that it could not be required.[38] But the ICAO Air Transport Committee later prevailed upon the Secretariat to reconsider and revise its views on the subject. In its opinion, and that of the ICAO Council, which subsequently issued a gloss on this article for the guidance of the ICAO members, without binding effect, 'the regulations, conditions or limitations' which a State may impose according to Article 5 (2) include also the requirement of prior permission.[39] This interpretation, together with the ICAO Council which uttered it, has since been the object of some severe criticism.[40] Professor Goedhuis maintains that it 'is incorrect and . . . leads to a misjudgment of the principle "pacta sunt servanda."'[41]

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[36] 'Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

'Such aircraft, if engaged in the carriage of passengers, cargo, or mail for remuneration or hire on other than scheduled international air services, shall also, subject to the provisions of Article 7 [a contracting State's right not to allow sabotage], have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable.'

[37] A definition of a scheduled international air service was adopted by the ICAO Council on March 25, 1952, for the guidance of members, without binding effect (Doc. 7278–C/841, 10/5/52).

[38] ICAO Doc. 6894, AT/694, 26/8/49.

[39] ICAO Doc. 7278–C/841, 10/5/52, Part II (11) (b), p. 12.

[40] Principally by Dutch writers, D. Goedhuis, '*Pacta sunt servanda,*' *Rechtskundige Opstellen aangeboden aan Professor Cleveringa*, 1952, p. 20; J. J. Goudsmit, *Het Internationale Ongeregelde Luchtvervoer*

Current interpretation of Article 5 seems to regard it as being composed of two parts: (a) Paragraph 1 on *non-commercial* non-scheduled flights and (b) Paragraph 2 on *commercial* non-scheduled flights. In fact, however, it covers three separate issues:

(a) The *right* of entry into and the right of transit, with or without technical stops, across the territories of other contracting States, for the civil aircraft of a contracting State not engaged in scheduled international air services and *not* engaged in the carriage of passengers, cargo or mail for remuneration or hire (*i.e.*, non-commercial non-scheduled flights). It would be contrary to Article 5 for the State overflown to subject the exercise of this right to the requirement of its prior permission. While twenty-eight member States do not,[42] seven do require it at least in respect of some of their territories.[43] The requirement of eleven States varies according to circumstances,[44] and that of eighteen States is not known.[45]

(b) The *right* of entry into and the right of transit, with or without technical stops, across the territories of the other contracting States, for the civil aircraft of a contracting State *engaged in* the carriage of passengers, cargo or mail for remuneration or hire on other than scheduled international air services (*i.e.*, commercial non-scheduled flights). Here again, a prior per-

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*en Artikel 5 van het Verdrag van Chicago,* 1953, pp. 91 *et seq.*; J. P. Honig, *The Legal Status of Aircraft,* 1956, pp. 25 *et seq.* See also H. Oppikofer, 'Aktuelle Probleme des Luftrechts,' *Zeitschrife für Schweizerisches Recht* (1946), p. 192; O. Riese, *Luftrecht,* 1949, p. 136; J. T. Lacour et O. Riese, *Précis de droit aérien,* 1951, p. 92.

[41] 'Questions of Public International Air Law,' 81 *Recueil La Haye* (1952), p. 205, at p. 267.

[42] This and the following statistical information relating to Art. 5 is derived from Goudsmit, *op. cit.,* in note 40 above, pp. 73–4. The following twenty-eight States merely require notification: Belgium, Belgian Congo, Canada, Ceylon, Chile, Denmark, France, Greece, India, Indo-China, Indonesia, Iraq, Ireland, Israel, Italy, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Paraguay, Peru, Portugal, Syria, South Africa, United Kingdom, United States, Sweden and Switzerland.

[43] Egypt, Finland, Libya, Nicaragua, Philippines, Turkey, Gibraltar.

[44] Argentina, Australia, Brazil, Burma, Columbia, Cuba, Dominican Republic, Portuguese Colonial Territories, Spain, British Protectorates in the Persian Gulf Area.

[45] Afghanistan, Austria, Bolivia, Czechoslovakia, El Salvador, Ethiopia, Guatemala, Haiti, Iceland, Iran, Jordan, Korea, Lebanon, Liberia, Luxemburg, Poland, Thailand, Venezuela.

mission should not be required. Twenty-seven member States do not require it,[46] but the number of those that do is increased to thirteen.[47] The practice of eight varies,[48] and that of sixteen is not known.[49]

(c) The *privilege* of carrying revenue-traffic to and from the territory of another contracting State. While this privilege may only be exercised by aircraft mentioned under (b) above, it is nevertheless distinct from the *right* they enjoy under (b). In respect of the exercise of this privilege, the State overflown has under Article 5 (2) complete discretion in imposing such conditions as it considers desirable, including the requirement of prior permission. Here only six States do not require a prior permission,[50] while thirty-six do.[51] The practice of five States depends upon circumstances,[52] and that of fifteen is not known.[53]

Moreover, some States[54] subject the grant of a prior permission to the condition that their national airlines raise no objection. Others[55] in principle would not allow foreign non-scheduled operators to carry regional traffic without a special agreement, while three[56] of the Arab States would not authorise Israeli traffic.

The controversy as to whether prior permission is required or not for non-scheduled international flights, leading to the many divergencies in the practical application of Article 5 of the Chicago Convention, extends also to transit rights of scheduled international air services under the International Air Transit Agreement. In November, 1950, Pakistan submitted this issue to the ICAO Council which formulated the question as follows:

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[46] The same States as those set out in note 42 above, with the exception of Chile and Peru, but with the addition of Cuba. They all require merely prior notification.

[47] In addition to those States listed in note 43 above: Argentina, Brazil, Columbia, Czechoslovakia, Peru, Spain.

[48] Except Argentina, Brazil, Columbia, and Spain which now require prior permission, those States listed in note 44 above, with the addition of Cuba, Chile and Iceland.

[49] States listed in note 45 above, except Czechoslovakia and Iceland.

[50] They merely require prior notification: Denmark, Indonesia, the Netherlands, Paraguay, Syria and Sweden.

[51] Argentina, Australia, Belgium, Belgian Congo, Brazil, Burma, Canada, Ceylon, Columbia, Cuba, Czechoslovakia, Dominican Republic, Egypt, Finland, France, Greece, Guatemala, Iceland, Indo-China, Iraq, Ireland, Israel, Italy, Libya, Mexico, Nicaragua, New Zealand, Trust Territory of Western Samoa, Norway, Pakistan, Peru, Philippines, Portugal, Portuguese Colonial Possessions, Spain, Turkey, United States and the United Kingdom in respect of Cyprus, British East Africa, Gibraltar, Hong Kong, Malta, British Protectorates in the Persian Gulf.

[52] Columbia, India, South Africa, United Kingdom, Switzerland.

[53] Afghanistan, Austria, Bolivia, El Salvador, Ethiopia, Guatemala, Iran, Jordan, Korea, Lebanon, Liberia, Luxemburg, Poland, Thailand, Venezuela.

[54] Belgium, Canada, India. The information contained in this paragraph is derived from D. Goedhuis, *op. cit.*, in note 41 above, pp. 270–1.

[55] Australia, Pakistan and to some extent also India.

[56] Iraq, Lebanon and Syria.

> '(a) Airlines as such have no rights under the Transit to require that a permit be obtained by scheduled international air services of other States, parties to the Transit Agreement, before flights without landing over its territory are initiated?
>
> '(b) If so, what form of permit may be required and to what extent has the State to be overflown the discretion to grant or withhold the same?'

The matter was discussed in 1950 and 1951 by the Council under Article 54 (*n*) of the Chicago Convention and opinions were invited from members. Five States submitted comments, four[57] of which answered question (a) in the negative so that question (b) did not arise. The ICAO Council delegate of the United Kingdom, the fifth State, submitted the following conclusions,[58] the correctness of which seems difficult to challenge:

> (a) Airlines as such have no rights under the Transit Agreement; the rights are exchanged between contracting States;
>
> (b) Article I, section 5 [of the Transit Agreement] clearly contemplates the issue of a certificate or permit to the airline; the application of such permit should be sponsored by the parent contracting State of the airline;
>
> (c) The airlines exercising the privileges must do so in accordance with the provisions of the Convention and must comply with the laws of the State flown over;
>
> (d) The form of the permit is left to the discretion of the contracting State concerned;
>
> (e) The permission could be withheld, but only for reasons which are embodied in Article I, section 5, of the Transit Agreement[59];

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[57] Burma, Finland, Luxemburg and the Netherlands.

[58] ICAO Doc. C–WP 848; Doc. 7107–8, C. 823–8; Heller, *op. cit.,* in note 33 above, § 184.

[59] 'Each contracting State reserves the right to withhold or revoke a certificate or permit to an air transport enterprise of another State in any

(f) The permission could be limited by specifying certain routes and airports according to Article I, section 4, and could be granted subject to the airline providing a commercial service (Article I, section 3);

(g) A permit should not be withheld as a means of evading the obligations assumed under the Transit Agreement.

The ICAO Council, however, gave what the Canadian member described as a 'rather cryptic' answer[60] and Pakistan complained that her two questions 'have not been effectively answered.' They remain open.

### DELIBERATELY AMBIGUOUS PHRASEOLOGY

Cryptic answers to difficult questions are not, however, the monopoly of the ICAO Council. Diplomatic conferences drawing up international documents are all past masters in this art. But ambiguous language at most postpones the evil day and always ends up by creating additional difficulties.

The place of honour in this case must be given to Article 25 of the Warsaw Convention of 1929 for the Unification of Certain Rules relating to International Carriage by Air,[61] the first paragraph of which is worded as follows:

> *'Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui d'après la loi du tribunal saisi, est considérée comme équivalente au dol.'*

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case where it is not satisfied that substantial ownership and effective control are vested in nationals of a contracting State, or in case of failure of such air transport enterprise to comply with the laws of the State over which it operates, or to perform its obligations under this Agreement.'

[60] '(1) The Convention on International Civil Aviation, and in particular Article 6 thereof, does not override the provisions of Section 1, Article I of the International Air Services Transit Agreement.

'(2) A State by becoming party to the Air Transit Agreement, grants the privileges of transit and landing for non-traffic purposes—subject to the requirements of other provisions of this Agreement—to other States party to the same Agreement with respect to their scheduled international services' (ICAO Doc. 7101–12, C/823–12).

[61] See note 10 above. The Convention was drawn up in French only (Art. 36). In the First Schedule to the Carriage by Air Act, 1932, Art. 25 (1) has been translated as follows: 'The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.'

This article is probably responsible for more litigation than all the others in the Warsaw Convention put together. Indeed, at the revision of the Warsaw Convention at The Hague in 1955, the International Air Transport Association was willing to agree to an increase in the limits of the carrier's liability if the wording of Article 25 could be made more precise. Many of the critics of this article overlook, however, the real reasons why it is so fertile of litigation.

It may be said, in general, that the Warsaw Convention establishes three types of liability of the carrier in respect of international carriage by air:

(a) A carrier incurs a *limited liability*[62] for any injury or damage caused to any passenger,[63] registered luggage or goods[64] during the period of carriage by air, but he can escape this liability either partly or entirely if he proves that he and his agents have taken all the necessary measures to avoid the damage, that alternatively the damage was unavoidable,[65] or lastly, if the *lex fori* admits this defence, that the person who has suffered the damage was guilty of contributory negligence.[66]

In form, the carrier appears responsible only for damage caused by his negligence or the negligence of his servants and agents. But the burden of proving the absence of negligence is so heavy that the carrier frequently cannot escape liability even where there is no positive evidence of his negligence or that of his servants and agents.

This circumstance, together with the fact that the limits of his liability under the Warsaw Convention are relatively low, seldom makes it worth the carrier's expenses to resist in court claims within the Warsaw limits whenever damage is shown to have been incurred. It is known that in the carriage of passengers, some carriers simply insure each passenger for the modest amount of approximately £3,000, which at the current price of gold is the limit of his liability in respect of personal injuries including death, and would pay compensation for any injuries suffered almost as a matter of course.[67] Litigation is thus naturally infrequent.

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[62] Art. 22.
[63] Arts. 17, 19.
[64] Arts. 18, 19.
[65] Art. 20.
[66] Art. 21.
[67] See 9 *Current Legal Problems* (1956), p. 208, at p. 227, note 12.

(b) A carrier who has failed to comply with the mandatory sections of those provisions of the Warsaw Convention concerning documents of carriage[68] incurs an *objective and unlimited liability*[69] for any damage occurring during the period of carriage by air. The penalty in this case is so drastic that carriers generally take the greatest care to ensure that these provisions are observed. And, should there be a failure to do so, the facts and the legal consequences thereof would be so easy to establish that the occasion for going to court would again be very infrequent.[70]

(c) Thirdly, under the above mentioned Article 25 of the Warsaw Convention, a carrier incurs *unlimited liability* if the damage is caused by his '*dol où . . . une faute qui d'après la loi du tribunal saisi, est considérée comme équivalente au dol*' or by that of his servants and agents acting within the scope of their employment. Article 25 thus becomes the obvious point of attack for the plaintiff wishing to obtain damages beyond the modest Warsaw limits and, at the same time, the point where the carrier must make a stand unless he is prepared to settle the claim for an amount higher than those limits. Hence the frequency of litigation.

This crucial character of Article 25 lends both importance and prominence to the unhappy wording of the Article itself. Historically, it can be traced to the second session of the *Comité international d'experts juridiques aériens* (CITEJA) in Paris, 1927. During the preliminary drafting stage of the Convention, its Second Commission suggested the insertion of a provision whereby the carrier would not be able to benefit from the limitation and exclusion of his liability under the Convention if the damage was caused by his '*actes illicites intentionnels.*'[71] At the

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[68] Arts. 3, 4, 8 and 9.

[69] See *loc. cit.* in note 67 above, at pp. 223 *et seq.*

[70] Of the cases that have been judicially decided on passenger tickets, see *Glenn* v. *Cia Cubana de Aviacion, S.A.*, 1951 USAvR 182 (non-delivery); *Froman* v. *P.A.A., Inc.*, 1948 USAvR 47; 1949 *ibid.* 168; 1953 *ibid.* 1; 1954 *ibid.* 400 (delivery *vel non*); *Grey* v. *American Airlines, Inc.*, 1950 USAvR 507; 1955 *ibid.* 60 (contents); *Preston* v. *Hunting Air Transport Ltd.* [1956] 1 Q.B. 454 (contents). On air consignment notes, see *Westminster Bank Ltd.* v. *Imperial Airways Ltd.* [1936] 2 All E.R. 890 (absence of statement on liability); *Philippson* v. *Imperial Airways Ltd.* [1939] A.C. 332 (absence of statement on liability); *Kraus* v. *K.L.M.*, 1949 USAvR 306 (reference to timetable); *Rotterdamsche Bank N.V.* v. *B.O.A.C.* [1953] 1 All E.R. 675 (reference to timetable); *American Smelting and Refining Co.* v. *Philippine Airlines Inc. of Manila*, 1954 US&CAvR 221 (mention of agreed stopping places).

[71] Report of De Vos to the Second Session, *Compte rendu*, p. 65.

Warsaw Conference, 1929, the German delegation proposed that in the interpretation and application of this provision '*la faute lourde est assimilée au dol.*'[72]

The British delegate, Sir Alfred Dennis, suggested that the term 'wilful misconduct' in English would cover 'not only acts committed deliberately but also acts of carelessness without any regard for the consequences.' He expressed the fear that for English speaking people, it would be 'very difficult to understand these words *acte illicite intentionnel.*'[73] 'As regards the proposed amendment concerning *faute lourde*, this expression is not known in our law. It is a question of degrees in negligence. We cannot translate in our language *faute lourde* in a way that it will have a legal meaning.'[74]

After some discussion the matter was referred to the Drafting Committee from which the phrase '*dol ou . . . une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol*' emerged with a sigh of relief and gratification from its Chairman: 'We have succeeded in finding this formula which has also satisfied our friends from Great Britain, whereby we have succeeded in adapting the expression of *faute lourde* and of *dol*, which is difficult to translate into English.'[75]

From the scanty discussion of the issue at the Warsaw Conference, Dr. Drion in his valuable study[76] concludes that 'the problem was considered to be one of draft[s]manship only, and the difference to be one in terminology, not in views.' For this reason, he is of the view that 'the reference to "the law of the Court seized of the case" was not intended to be a reference to rules of substantial [substantive?] law but merely a reference to terminology.' In this sense, Article 25 contains a formula that deliberately allows a plurality of definition under national laws of a concept which was apparently agreed upon internationally but is only partially expressed in the Article itself. What merits marvel is not the extent of divergence in its interpretation and application, but the relative degree of uniformity.

Just before the vote was taken on this article at the Warsaw

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[72] *Compte rendu de la IIe Conférence internationale de droit privé aérien, 1929* (Warsaw, 1930), p. 40.

[73] *Ibid.*, p. 40.

[74] *Ibid.*, p. 41.

[75] *Ibid.*, p. 139.

[76] *Limitation of Liabilities in International Air Law*, 1954, § 171.

Conference, Sir Alfred Dennis made the following statement: 'I should like it to be recorded in the minutes that, as shown by previous explanations, we have in English the term "wilful misconduct" to translate these words, which is well understood and has a well defined meaning in our law.'[77] In the Carriage by Air Act, 1932, to which the Warsaw Convention forms the First Schedule, these words have, however, been translated into 'wilful misconduct or . . . such default . . . as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.' But Barry, J., in his instruction to the jury in *Horabin* v. *B.O.A.C.*, said: 'You need not trouble about the latter phrase, because in the law of this country a default or omission to do something can be just as much misconduct as the doing of something which is wrong.'[78]

On the other hand, civil law countries, parties to the Warsaw Convention, have generally rendered the phrase '*faute lourde . . . équivalente au dol*' into 'gross negligence' in their own legislation.[79] The introduction of the notion of gross negligence means that the carrier's liability is limited only in the case of ordinary negligence. Whenever his negligence or that of his servants and agents is of an aggravated character, he loses all the benefits but none of the burdens of the Convention. It seems that this would amount to an extension of the carrier's liability beyond the intention of the framers of the Warsaw Convention.[80]

As a general rule, however, it appears that courts of the various contracting States have all striven to give a reasonable interpretation to this provision. Here, it is not possible to enter into even a summary discussion of the many judicial decisions relating thereto,[81] but some observations of a general character may perhaps not be out of place and might assist in the proper understanding of one of the most highly disputed issues in air law.

Essentially, the civil law concept of *dolus* implies an intentionally unlawful act with injurious consequences. Its material constituent elements are thus: (a) an act, (b) its unlawfulness and (c) its injurious consequences. But its chief characteristic consists in its psychological element which is the intention of the doer in relation to each of these three material elements. There is no *dolus* if the doer did not intend the act, or, intending the act, he did not know it was unlawful, or, intending the act and knowing it to be unlawful, he did not intend that it should cause injury to others, *e.g.*, if he had hoped and vainly taken certain precautions to avoid the injury.

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[77] *Loc. cit.* in note 72 above, p. 140.

[78] [1952] 2 All E.R. 1016 at 1019.

[79] See *op. cit.* in note 76 above, § 179, *e.g.*, Germany (*grobe Fahrlässigkeit*), Italy (*colpa grave*), the Netherlands (*grove schuld*).

[80] *Cf.* D. Goedhuis, *National Airlegislations and the Warsaw Convention*, 1937, pp. 275 *et seq.*

[81] See 9 *Current Legal Problems* (1956), p. 208, at pp. 231 *et seq.*; see also Document No. 36 prepared by the ICAO for The Hague Conference, 1955, entitled *Cases on the Warsaw Convention* (*1929–55*) which is very useful for reference purposes.

The concept of wilful misconduct in English law differs from *dolus* in this regard in that the wilfulness of the doer is merely required in respect of (a) the conduct and (b) its wrongfulness.[82] The intention to inflict injury is not required.

Civil law systems, however, in various branches of the law, have been struggling for some time, each in its own way, to find a formula so that wanton recklessness resulting in injury to others might be dealt with on the same basis as *dolus*. But the solutions adopted, all indeed of a makeshift character, differ from country to country. Some enlarge the notion of *dolus*,[83] others introduce the concept of *dolus eventualis*,[84] while many assimilate certain aggravated cases of negligence (*faute lourde*) to *dolus*. No neat formula representing an organic concept has, however, been found in any of them to embrace the whole of this amorphous notion which defies the logical systematics so dear to the civil law tradition and still less does there exist any common denominator among the various civil law systems.

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[82] See, *e.g.*, Barry, J., instructing the jury in *Horabin* v. *B.O.A.C.*: 'Wilful misconduct is misconduct to which the will is a party. . . . The will must be a party to the misconduct, and not merely a party to the conduct of which complaint is made. . . . To establish wilful misconduct . . ., it must be shown, not only that [the person concerned] knowingly (and in that sense wilfully) did the wrongful act, but also that, when he did it, he was aware that it was a wrongful act, *i.e.*, that he was aware that he was committing a misconduct' ([1952] 2 All E.R. 1016 at 1019).

[83] *Cf.* the case of *A. Caffat Chaddoud* v. *Anglo-Mexican Petroleum Co., Ltd.*, 1 *R. brasileiro D.A.* (1951), p. 221, decided by the Appeal Court of Rio de Janeiro, where the court held that in Brazilian law gross negligence was not assimilated to *dolus*. The court did not, however, restrict *dolus* to intentionally wrongful and injurious acts, but considered that it included acts in which the doer 'foresees, realises and, without refraining from accomplishing the act, assumes the risk of producing the result.' It maintained that this was the proper meaning of *dolus* and not the result of assimilating gross negligence to it. For a discussion of this case, see *op. cit.* in note 76 above, § 179.

[84] This is the case of a person, behaving as if he did not care whether others might be injured or not, wilfully commits an act, knowing that it is unlawful and likely to cause injury.

But if any agreement can be said to have existed at the Warsaw Conference, it was to include this twilight region between *dolus* and *culpa* in Article 25 as a reason for depriving the carrier of the benefit of those provisions in the Convention which limit or exclude his liability. In this sense only is it possible to speak of the international unity of Article 25, with national divergencies merely in terminology but not in substance.[85] Thus the difficulties of the authors of this Article were not in fact related to the rendering of a civil law concept into English, but rather to the finding of a satisfactory formula which did not then exist and still does not exist in the civil law systems to describe what in English law is called wilful misconduct.

It is, therefore, of interest to observe that in the interpretation of this article courts on the Continent have sometimes referred to the notion of wilful misconduct in English law and construed it in that sense.[86] This oft maligned provision might thus one day achieve the rare distinction of being instrumental in introducing a notion of English law into the civil law systems, and it should not escape notice that, after experimenting with two other formulations in the two Rome Conventions on Surface Damage, those of 1933[87] and 1952,[88] the framers of international uniform air law finally decided, in the 1955 Hague Protocol amending the Warsaw Convention, on a paraphrase of the common law notion of wilful misconduct.[89]

### DIFFERENCES IN LEGAL TRADITION

Article 25 of the Warsaw Convention has been described as 'the result and the starting point of a comedy of errors.'[90] But all's well that ends well. Frequently, irreconcilable differences exist not with regard to legal terminology but because of differences in legal tradition. The ebb and flow in the fortune of the proposed Franco-Italian Code of Obligations should serve as a reminder of the inherent difficulties in even an attempt to unify rules of two closely related legal systems, in the absence of political integration.

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[85] See above, the text to note 76.

[86] See 9 *Current Legal Problems* (1956), p. 208, at p. 231, note 1.

[87] Art. 14.

[88] Art. 12 (1).

[89] See *loc. cit.* in note 86 above, pp. 231 *et seq.*

[90] *Op. cit.* in note 76 above, § 170.

It is well known that, as a substitute for the unification of substantive rules, conflicts of law and jurisdiction can be eliminated by unifying the rules of private international law determining the applicable law and the competent jurisdiction. Thus in the 1948 Geneva Convention on the International Recognition of Rights in Aircraft,[91] the system of law applicable to the constitution of the various rights given protection by the Convention is the law of the State in which the aircraft is registered—the law of the flag.[92] At the present stage of development of the unification of air law, there is often no need to go any further.

From this point of view, international conventions unifying rules of private air law generally preserve the accepted rule of the conflict of laws of applying the *lex fori* in matters of procedure,[93] including the methods of payment of damages,[94] the calculation of the periods relating to limitation of action[95] and the rules governing the proceedings of a sale in execution.[96] There is little doubt that rules of procedure are closely interwoven with the political fabric of a State and are firmly anchored in its legal tradition and would, therefore, be the most difficult to unify internationally. But it does mean that at times the position of the parties may in practice be materially affected. For instance, since the monetary limits of the carrier's and the operator's liability, under respectively the Warsaw Convention of 1929 and the Rome Convention of 1952, are regarded as exclusive of costs,[97] the amount of costs recoverable by a plaintiff might differ from jurisdiction to jurisdiction, the matter being governed by the *lex fori*.[98]

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[91] Cmd. 7510 (1948).

[92] Art. I (1) (i) and (ii), Art. X.

[93] Warsaw Convention, Art. 28 (2). *Cf.* 1952 Rome Convention, Art. 20 (4).

[94] Warsaw Convention, Art. 22 (1). *Preston* v. *Hungting Air Transport, Ltd.* ([1956] 1 Q.B. 454) seems to indicate that, in the United Kingdom, in so far as the calculation of damages is concerned, Art. 17 is to be interpreted as an international uniform rule. Similarly, in the United States, in *Salamon* v. *K.L.M.*, 1951 USAvR 378 and 1955 *ibid.* 80; but *cf. contra* in the United States *Choy* v. *P.A.A.*, 1942 USAvR 93; *Wyman* v. *P.A.A.*, 1943 USAvR 1; *Komlos* v. *Air France*, 1952 US&CAvR 310. The 1952 Rome Convention provides in its Art 1 (1) that 'there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto.'

[95] Warsaw Convention, 1929, Art. 29 (2). See France, Civil Tribunal of the Seine: *Missirian* v. *Air France* (11.1.1956), I.A.T.A. Rep. on Air Carrier's Liability, No. 34. Geneva Convention, 1948, Art. IV (4) (b); Rome Convention, 1952, Art. 21 (2).

[96] Geneva Convention, 1948, Art. VII (1).

[97] Rome Convention, 1952, Art. 20 (10); the Warsaw Convention as amended by the 1955 Hague Protocol, Art. 22 (4). See *contra* a decision of the Rio de Janeiro Court of Appeal of December 10, 1948, reported in 1 *R. brasileiro D.A.* (1951), p. 203, summarised in 16 R.G.A. (1953), p. 56 and cited in Drion, *op. cit.* in note 76 above, § 102.

There are, moreover, several issues of substantive law on which agreement has been found to be difficult in the past. Thus in 1929, because of the position under the common law at the time,[99] the effect of an injured person's own negligence in causing or contributing to the damage complained of was left to the *lex fori* by the Warsaw Convention (Article 21). Since then the law in England and in some other common law countries has been modified and the 1952 Rome Convention on Surface Damage succeeded in securing international agreement on the substantive rules.[1] In the 1955 Hague Protocol amending the Warsaw Convention, the opportunity was, however, not taken to introduce a similar provision in the Warsaw Convention as amended.[2] Furthermore, both the 1929 Warsaw Convention and the 1952 Rome Convention leave the *lex fori* to determine who are the persons entitled to bring an action for damages arising out of the death of a person.[3]

Under the 1952 Rome Convention in contradistinction to the 1933 Convention (Article 16), only the courts of the contracting State in which the surface damage occurred have jurisdiction (Article 20 (1)). The application of the *lex fori* in such a case at least eliminates and does not create conflicts, even though it may lead to differences in the solution of the dispute. But under the Warsaw Convention, the plaintiff, at his option, may bring action at any one of four different places: (a) where the carrier is ordinarily resident, (b) where he has his principal place of business, (c) where he has an establishment by which the contract has been made[4] and (d) the place of destination, provided that the place selected is in the territory of one of the contracting States (Article 28 (1)).

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[98] Geneva Convention, 1948, Art. VII (6); the Warsaw Convention as amended by the 1955 Hague Protocol, Art. 22 (4).

[99] *Cf.* the British delegate at the Warsaw Conference, 1929; see *loc. cit.* in note 72 above, p. 137.

[1] Art. 6. This convention has not yet been ratified by the United Kingdom.

[2] See 9 *Current Legal Problems* (1956), p. 208, at p. 224.

[3] Carriage by Air Act, 1932, s. 1 (4); *ibid.*, Second Schedule to the Act; Rome Convention, 1952, Arts. 1, 2 (2), 14.

[4] *Cf.* U.S.A., New York County, Supreme Court: *Kapell* v. *United Airlines, Inc. et al.*, I.A.T.A. Rep. on Air Carrier's Liability, No. 36.

At present, there appears to be little in the Convention[5] to prevent a plaintiff, and especially several plaintiffs in respect of the same claim or the same accident, from bringing action either simultaneously or successively before different courts in different countries, resulting in different, divergent and even conflicting judgments. Indeed, since the Warsaw Convention does not oblige a contracting State to recognise or to enforce the judgments delivered by the competent tribunal of another contracting State, a plaintiff may sometimes be obliged to bring suit in different States.

Basically, the reluctance of States to recognise the courts of a single country as exclusively competent or to recognise and enforce one another's judgments delivered by a competent tribunal springs from their lack of confidence in the laws and judicial procedure of some of their co-contracting States, whether present or prospective.[6]

In this regard, a significant, though cautious, step forward was taken at the Rome Conference, 1952, whereby in the Convention on surface damage, contracting States undertake to recognise and enforce one another's judgments delivered under the Convention, even though this undertaking is beset with provisos (Article 20 (5) *et seq.*).[7]

## DEFECTIVE DRAFTSMANSHIP

There is a traditional belief that the draftsmen of laws and legal documents in general always ponder lengthily over each word and every comma and are quite incapable of oversight or inconsistencies due either to haste or other shortcomings of the common mortal. This belief is useful as a fiction in order to treat as authoritative what has been set out in the document itself and not what might have been the specific intention or purposes in the mind of those making it for which the text affords no evidence. As a statement of fact, however, this belief is as near to and far from the truth as any other superstition.

A more illuminating example of defective draftsmanship can hardly be found than the use of the term 'High Contracting Parties' in the Warsaw Convention. The decision of the House of Lords in *Philippson* v. *Imperial Airways Ltd.*,[8] might have caused merely a storm in a tea cup, but it was one which prompted the British Government immediately to take the rather extraordinary procedure of sending a diplomatic Note to the United States Government dissociating itself from the decision and to reaffirm its 'opinion that the ordinary meaning of High Contracting Party in a convention is to designate a party who is bound by the provisions of a convention and therefore does not cover a signatory who does not ratify it.'[9]

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[5] Except perhaps the words 'option,' 'in the territory of *one* of the High Contracting Parties' (italics added) and 'or' in Art. 28 (1).

[6] *Cf.* D. Goedhuis, *National Airlegislations and the Warsaw Convention,* 1937, pp. 286 *et seq.*

[7] *Cf.* M. de Juglart, *La Convention de Rome du 7 octobre 1952,* 1956, pp. 151 *et seq.* The United Kingdom has not yet ratified this Convention.

This is perfectly correct and the United States Government had no hesitation in concurring in this view.[10] But while some of the noble Lords were disposed to agree with it, they also had no difficulty in showing how loosely and illogically the draftsmen of the Warsaw Convention had used the term. Speaking of the provisions of the Warsaw Convention incorporated by reference in the defendants' conditions of carriage, Lord Atkin held:

> 'I find it impossible to make sense of these provisions, except by giving High Contracting Parties the meaning of signatories, extending it to non-signatories who take advantage of the provisions as to accession . . . "As soon as this Convention shall have been ratified by five of the High Contracting Parties" [when, under its Article 37 (2), the Convention comes into force] cannot mean "ratified by five of the five who have ratified" . . . While Article 40 makes that certain, which was plain enough before, for it provides for a declaration by "any High Contracting Party at the time of signature."'[11]

His Lordship's logic seems irrefutable.

Fortunately although this does not appear to be realised as widely as it should be, the case turned on the interpretation of the conditions of contract in the air consignment note used by the parties which incorporated the provisions of the Warsaw Convention and was not decided on the basis either of the Warsaw

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[8] [1939] A.C. 332.

[9] Hackworth, 4 *Digest*, pp. 373 *et seq.*

[10] *Ibid.*

[11] At p. 348.

Convention as such[12] or the Carriage by Air Act, 1932,[13] in the interpretation of which the decision in *Philippson* v. *Imperial Airways Ltd.* is, therefore, no more than *obiter dictum.* It serves, however, as a standing warning to all those called upon to draft international documents.

One should perhaps not leave this section without mentioning the efforts made at The Hague in 1955 to remedy the errors of 1929. The amendment Protocol adds the following Article 40A to the Warsaw Convention:

> 'In Article 37, paragraph 2 and Article 40, paragraph 1, the expression *High Contracting Party* shall mean *State.* In all other cases, the expression *High Contracting Party* shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.'

This has been adapted from Article 30 of the 1952 Rome Convention which uses a similar definition. In both cases, it is open to the interpretation that a State is a High Contracting Party only if, having ratified or adhered to the Convention, it has also denounced it but its denunciation has not yet become effective!

The Hague Protocol has probably been more successful in clearing another ambiguity in the Warsaw Convention. Article 22 at present provides that, in the carriage of registered luggage and of goods, 'the liability of the carrier is limited to a sum of 250 [Poincaré] francs per kilogram,' without specifying whether this is (a) per kilogram of the luggage or goods actually damaged or lost, (b) per kilogram of the piece of luggage or package of goods in which the article damaged or lost was originally packed or (c) per kilogram of the total consignment. The Hague Protocol specifies alternative (b).[14]

## REVOLT AGAINST THE TEXT

It sometimes happens that after a State has entered into an international agreement unifying rules of air law, subsequent events reveal that some of the provisions are unreasonable or inequitable, thus leading judges and juries to revolt against the unified rules.

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[12] In fact, of the five judges, a majority of three (Lords Thankerton, Russell and Macmillan) considered that in the Warsaw Convention, as such, the term High Contracting Parties referred to States effectively bound by the treaty.

[13] Of the five judges, a majority of four (Lords Atkin, Thankerton, Russell and Macmillan) considered that in the Carriage by Air Act, 1932, the term High Contracting Parties referred to States effectively bound by the Warsaw Convention.

[14] See 9 *Current Legal Problems* (1956), p. 208, at pp. 229 *et seq.*

A case of this nature is the decision in *American Smelting and Refining Co. et al.* v. *Philippine Airlines Inc. of Manila.*[15] In that case, the carrier, in a carriage which obviously could not have been made without intermediate stops, failed to insert in the air consignment note the relevant stopping places. According to Article 9 of the Warsaw Convention which was applicable to this carriage, the carrier should therefore have lost the benefit of those provisions in the Convention which limited or excluded his liability. A United States Court refused to adhere to a strictly literal interpretation of the Convention maintaining that this would lead to results which would be 'grossly unjust, harsh and inequitable and contrary to the purpose and aims of the Warsaw Convention.'[16] However reasonable this decision may be, it is obviously not in strict accordance with the terms of the Convention. The 1955 Hague amendment Protocol has attempted to meet this stricture of the Convention by drastically simplifying the requirements of documents of carriage in the Warsaw Convention.[17]

The Hague Protocol was, however, principally designed to meet another complaint against the Warsaw Convention, the very low ceiling of the carrier's liability, especially that in respect of personal injuries, including death, which, as has previously been mentioned,[18] is at present about £3,000. For that reason, a jury may be inclined to find wilful misconduct on the part of the carrier where there is none in order to allow damages in excess of this meagre sum.

A rather dramatic illustration of this revolt is the case of *Goepp* v. *American Overseas Airlines, Inc.*[19] In *Ritts* v. *American Overseas Airlines, Inc.*,[20] an action brought by another plaintiff against the same defendants in respect of the same accident, a jury of the United States District Court, Southern District of New York, absolved the defendants of all liability, in accordance with Article 20 (1) of the Warsaw Convention, being satisfied that they had not only committed no wilful misconduct, but had in fact done everything which was necessary to avoid the damage, or that it was impossible to take such measures.

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[15] 1954 US&CAvR 221.
[16] At p. 226. *Cf.* above, p. 215.
[17] See *loc. cit.* in note 14 above, pp. 223 *et seq.*
[18] See above, p. 214.
[19] 1951 USAvR 527.
[20] 1949 USAvR 65.

But in the *Goepp* case before the Supreme Court of New York County, a jury by 10–2 found the carrier, in respect of the same accident, guilty of wilful misconduct under Article 25 of the Warsaw Convention[21] and returned a verdict of $65,000 in favour of the plaintiff, the Warsaw limit being $8,300. The defendants moved to set the verdict aside as against the weight of evidence, or alternatively, to reduce the verdict to the Warsaw limit. These motions were denied.[22] It is true that subsequently before the Appellate Division of the State of New York, the jury verdict was modified to the Warsaw limit of $8,300[23] and this was confirmed by the Court of Appeals, State of New York,[24] but a comparison of these two cases shows eloquently the ease with which divergencies in interpretation can arise out of a unified rule.

Meanwhile, all the three cases mentioned in this section should serve as a constant reminder of the advisability of an early ratification of the Hague Protocol which, by also doubling the limit of the carrier's liability in the carriage of passengers, would remove both sources of discontent in the present Warsaw Convention.[25]

## CONCLUSIONS

It seems hardly necessary, at this point, to repeat the truism that law is but a means to an end. To the extent that there is no real identity of interests, a unified or uniform law will seldom be a sufficiently strong tether to hold back essential differences and to prevent them from carrying the law to all the points of the compass in interpretation and application. Deliberate or unintentional ambiguity in the text of such uniform or unified legislation naturally lends wings to such inherent tendencies. But entrenched economic interests, varying national and legal traditions, differences in social structure and discrepancies in the standard of living provide them with fuel in their centrifugal flights, often propelling them far beyond the barriers of voluntarily accepted legal obligations.

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[21] See note 61 above and the text *ibid., passim.*
[22] 1951 USAvR 529.
[23] 1952 USAvR 486.
[24] 1953 USAvR 503.
[25] See *loc. cit.* in note 14 above, pp. 220 *et seq.*

Inversely, where identity of interests exists, there is usually no great difficulty in reaching agreement. Such agreements would frequently survive rough treatment at the hands of the draftsmen who give them form and may sometimes go beyond the bounds of legal duty.[26]

In so far as the Chicago Convention and its Annexes, the Two Freedoms Agreement and the Five Freedoms Agreement are concerned, the Council of the International Civil Aviation Organisation, with ultimately an appeal to the International Court of Justice, acts as a central judicature capable of giving an authoritative and binding interpretation of their provisions.[27] Experience has shown, however, that, that body being composed of national delegates and not independent judges, adept in the problems of air transport rather than steeped in the niceties of the law, its exercise of the judicial function has not always been an unqualified success. But, it need hardly be pointed out, so-called correctness in the interpretation of legal documents is highly subjective and relative.[28] One of the prime functions of judicial settlement is to bring a term to disputes and litigation[29]; for in law uniformity and certainty in interpretation often weigh more than strict scientific accuracy. The means to seek such uniformity and certainty in the interpretation of these international agreements lie in the hands of their contracting parties. As to any misgiving concerning the judicial qualifications of members of the ICAO Council, it should not be overlooked that so far no case has yet been brought before the International Court of Justice[30] on appeal from the ICAO. Can it be that States sometimes prefer fending for themselves in the troubled waters of divergent interpretation to the cool rigidity of a judicially interpreted rule?

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[26] Apart from the voluntary observance of the international standards established by the I.C.A.O., mention may also be made of the voluntary extension of the rules of the Warsaw Convention by States to carriage not governed by the Convention. See *e.g.*, Carriage by Air Act, 1932, s. 5 and the Carriage by Air (Non-International Carriage) (United Kingdom) Order, 1952.

[27] Chicago Convention, Art. 85; Transit Agreement, Art. II (2); Transport Agreement, Art. IV (3). While these agreements refer to the Permanent Court of International Justice, in virtue of Art. 37 of the Statute of the International Court of Justice, the latter Court is now competent.

[28] *Cf.* H. Kelsen's Preface 'On Interpretation' in his *Law of the United Nations*, 1950, pp. xiii *et seq.*

[29] *Cf.* the writer's *General Principles of Law as applied by International Courts and Tribunals*, 1953, pp. 379 *et seq.* See also J. B. Moore's 'Notes on the Historical and Legal Phases of the Adjudication of International Disputes' in his *International Adjudications*, Modern Series, Vol. I, 1929, pp. xc–xci.

In the sphere of private air law, until the time is ripe for the establishment of an international judicial or arbitral tribunal competent to review national judgments or arbitral awards, attempts may perhaps be made to secure increasingly wider acceptance of the principle of a single *forum* and the mutual recognition and enforcements of judgments delivered under international uniform air law. Meanwhile, greater efforts by the International Civil Aviation Organisation, States and other organisations and persons interested in the subject, in disseminating information concerning the practice of individual States, in drawing attention to the stultifying effects of divergent interpretation and application of unified rules, and in encouraging scientific studies both of the substance and of the technique of international and comparative air law[31] may well in time bring about an increasing degree of coalescence.

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[30] Mention may be made of Art. 26 of the Statute of the International Court of Justice, under which 'the Court may from time to time form one or more Chambers . . . for dealing with particular categories of cases; for example, . . . cases relating to transit and communications.' So far no recourse has been made either to the full Court or to one of its Chambers.

[31] On the course on International and Comparative Air Law at University College, London, and the Diploma awarded by the London Institute of World Affairs on the same subject, see 9 *Current Legal Problems* (1956) p. 233, note 8.

## 12

# THE CHANGING COMMONWEALTH

### Richard C. FitzGerald

The official statement issued on April 27, 1949, of the Commonwealth Prime Ministers in London stated that the Government of India had informed the other Governments of the Commonwealth of the intention of the Indian people that under the new constitution which was then about to be adopted, India should become a sovereign independent republic, and that the Government of India had, however, declared and affirmed India's desire to continue her full membership of the Commonwealth of Nations and her acceptance of the King as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth. The official statement then went on to record that the Governments of the other countries of the Commonwealth, the basis of whose membership of the Commonwealth was not thereby changed, accepted and recognised India's continuing membership in accordance with the terms of the declaration which concluded the official statement and which read: 'Accordingly the United Kingdom, Canada, Australia, New Zealand, South Africa, India, Pakistan and Ceylon hereby declare that they remain united as free and equal members of the Commonwealth of Nations, freely co-operating in the pursuit of peace, liberty and progress.'

In 1955 Pakistan became a sovereign independent republic and continues her full membership of the Commonwealth of Nations, accepting the Queen as the symbol of the free association of its independent member nations and as such the Head of the Commonwealth.

Mr. Strydom, Prime Minister of South Africa, when speaking at a dinner in London of the South Africa Club on June 25, 1956, stated that it was the policy of the present South African Government ultimately to establish a republican form of government in South Africa when a sufficiently large majority of the European voters should have expressed themselves in favour of such a step.[1] Mr. Strydom went on to give an emphatic assurance that this change in the form of government in South Africa would in no way whatsoever affect South African policy of co-operation with the United Kingdom and other Commonwealth countries, and all other countries and peoples who, like South Africa, subscribed to the western and democratic way of life.

The official statement issued on July 6, 1956, after the Conference of Commonwealth Prime Ministers[2] in London, records that during the course of the Conference the Prime Minister of Ceylon stated that, in accordance with their declared policy, the Ceylon Government proposed to introduce in due course a republican constitution for Ceylon, and had further stated that it was their intention that Ceylon should continue to be a member of the Commonwealth. The official statement then goes on to record that the other Prime Ministers took note of this statement, and expressed their agreement to Ceylon's remaining a member of the Commonwealth.

It is interesting to observe that whereas in 1949 India declared and affirmed her *desire* to continue her full membership of the Commonwealth, in 1956 Ceylon stated that it was her *intention* to continue to be a member. What was done in 1949 may have induced Ceylon to think that she could go a step beyond expressing a desire for continued membership, *viz.*, by proclaiming her intention to continue membership. If that is so, then it is regrettable, as agreement on the part of the other member nations should not have been taken for granted.

At the present time, therefore, the eight full members of the Commonwealth include two independent sovereign republics, and two members who intend to become independent sovereign republics. This means that two full members have ceased to owe allegiance to the Crown, and that another two are contemplating taking the same step. Monarchies and republics alike are capable of being, and are, full members of the Commonwealth.

## STRUCTURE

What is this 'free association' the member nations of which can be monarchies or republics, and of which the Queen is the symbol and as such the Head of the Commonwealth?

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[1] *The Times*, June 26, 1956.

[2] This was the seventh Conference of Commonwealth Prime Ministers to be held since the Second World War. The others were held in April, 1946; October, 1948; April, 1949; January, 1951; June, 1953, and February, 1955.

It is, I think, the generally accepted view that inter-Commonwealth relations are not those of international law. This means that the association is not a confederation. The distinctive mark of a confederation is a system of agreements between the members which were, when made, treaties between sovereign or semi-sovereign States, and consequently of international character. At no time have the obligations of the parts of the Commonwealth *inter se* been definitely formulated, and thus there never has been that definite accord which one is entitled to associate with some kind of alliance. The resolutions of the former Imperial Conferences on, *e.g.*, defence, never created an obligation on the part of any unit of the Commonwealth to assist the United Kingdom or any other unit, in any defined circumstances. The relationship between the members is too informal for the association to be a confederation, and too vague for the association to be styled an alliance. In fact, the position has become more vague since the Conferences of Commonwealth Prime Ministers took the place of the Imperial Conferences. The official statement issued after the 1956 Conference of Commonwealth Prime Ministers records 'the common understanding which the Prime Ministers have reached . . .'; that the Prime Ministers reviewed certain situations; noted with satisfaction certain matters; exchanged views on other topics; expressed agreement on a particular matter; and so on. In no single instance does the official statement record that the Prime Ministers passed a definite resolution, or undertook a definite obligation.

The vagueness of the relationship between the member nations has become unrealistic and impractical, and steps should be taken to clarify the situation. Is the relationship akin to that of partnership? If so, then each member or partner must be just and faithful to the other partners in all matters relating to or affecting the Commonwealth, and must at all times give to the other partners a true account of all such matters. Recent events raise doubts as to whether certain of the member nations have been just and faithful to their partners. On the other hand, just as a new partner cannot be admitted to a partnership without the consent of all the partners, so the admission of a new member of the Commonwealth requires the consent of all.

The Balfour Declaration of 1926 proclaimed the equality of the member nations of the Commonwealth. No one member of the Commonwealth can, therefore, have exclusive power to admit a new member: if it had, then obviously it would not be equal with the other members. It follows, therefore, either that any member acting alone can admit a new member, or a new member can only be admitted with the consent of all.

The admission of a new member inevitably involves the application of Commonwealth conventions to the new member and also, therefore, an extension of the conventional obligations of the members, who cannot be expected to accept such an extension unless they consent. It is submitted, therefore, that although the United Kingdom may confer full self-governing status on a territory under its jurisdiction, it cannot confer full membership of the Commonwealth on such a territory without the consent of the other member nations. This view is supported by the statement made by Lord John Hope, then Under-Secretary for Commonwealth Relations, when moving the second reading of the Ghana Independence Bill in the House of Commons on December 12, 1956. He said that whether Ghana would be a full member of the Commonwealth was a matter for all the members, and at the request of the Gold Coast (*i.e.*, Ghana) Government the United Kingdom Government were approaching other members on the subject. They had every hope that Ghana would become a full member on the same day that she became independent. He pointed out that when the Bill became law Ghana would be the first of the British dependent territories in tropical Africa to attain full self-government as a sovereign and independent nation, and stated that it was intended that independence should come about on March 6, 1957.[3]

The position of the Federation of Rhodesia and Nyasaland—the Central African Federation—further illustrates the point. For twenty years, first the Prime Minister of Southern Rhodesia, and now the Prime Minister of the Federation, have attended, by invitation and not as of right, meetings of Imperial Conferences and of Commonwealth Prime Ministers. In view of this fact, the 1956 Conference of Commonwealth Prime Ministers agreed that they would welcome the continued participation of the

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[3] See also *The Proposed Constitution of Ghana*, Cmnd. 71, presented to Parliament, February, 1957.

Prime Minister for the Federation in meetings of Commonwealth Prime Ministers.[4] By 1963 the Federation will in all probability have attained full autonomy under the constitution given to it by the United Kingdom in 1953, and thus have gained full status. The 1956 agreement of the Commonwealth Prime Ministers just referred to can reasonably be regarded as their consent in advance to the admission of the Federation to full membership of the Commonwealth. But the Federation wishes, in the meantime, to be granted technical Dominion status, but; as disclosed by Lord Malvern in the Federal House of Assembly on August 3, 1956, the British Government have rejected the request.

There appears to be a sharp difference of opinion between the Europeans and the Africans in the Federation. The former are anxious to acquire Dominion status for the Federation, whereas the Africans are bitterly opposed to such a grant, as apparently they want secession of Nyasaland from the Federation and self-government.

Lord Lloyd, then Under Secretary, Colonial Office, when moving the second reading of the British Caribbean Federation Bill in the House of Commons on July 23, 1956, said that when the Federal Government felt ready to assume the responsibilities and obligations involved in full self-government within the Commonwealth, and when it could demonstrate its ability to do so, the British Government would give their full and unreserved support to these West Indian ambitions and would be glad to sponsor the federation for membership of the Commonwealth. There is no specific reference to the British Caribbean Federation in the official statement of the 1956 Conference of Commonwealth Prime Ministers.

Mr. Lennox-Boyd, the Secretary of State for the Colonies, gave an assurance in May 1956 that the United Kingdom is still committed unequivocably to full self-government within the Commonwealth for Singapore, so that presumably this territory will in the not too distant future become a full member of the Commonwealth.

### BASIS OF ASSOCIATION

A decision of the greatest importance to Commonwealth relationships, and one which may have resulted in too great a loosening of the Commonwealth link, was made by the Imperial Conference of 1930 when it admitted that every member of the Commonwealth had the power to confer on any person a status operative throughout the Commonwealth. The Nationality Acts passed in the Commonwealth from 1946 to 1955 have upheld the principle that the status of Commonwealth citizenship gives in each member nation a preferential status compared with that of foreigners. The privileges accruing from Commonwealth citizenship are not uniform throughout the member nations, but up to January 28, 1957, no member nation had refused to accord privileges to Commonwealth citizenship. On that day, however, an ordinance signed by President Rajendra Prasad of India ended the special privileges enjoyed by Commonwealth citizens in India over other foreigners. Simultaneously an order was issued stating that the ordinance applied only to Pakistanis and South Africans.[5] This action of India contrasts unfavourably with the assertion in the official statement of the 1956 Conference of Commonwealth Prime Ministers that the governments and peoples of the Commonwealth seek friendly relations with all the peoples of the world, and it is hardly in keeping with the spirit that should animate Commonwealth relationships.

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[4] See official statement issued on July 6, 1956, after the 1956 Conference of Commonwealth Prime Ministers.

Up to the Second World War the institution of the Imperial Conference was one of the main forms of co-operation, and the deliberations of Imperial Conferences led *inter alia* to the resolutions on status which, in turn, led to the passing of the Statute of Westminster, 1931, which is perhaps the most important constitutional document affecting the Commonwealth. But, as the Canadian Prime Minister, Mr. Mackenzie King, said at the conclusion of, and when speaking of the nature of, the 1937 Imperial Conference: 'Its function is not to formulate or declare policy. The value of this, as of other Imperial Conferences, lies mainly in the free exchange of information and opinion; in furnishing the representatives of the several Governments with more adequate knowledge of the problems, the difficulties, the aspirations, the attitudes of other members of the British Commonwealth of Nations, and in giving that direct and immediate understanding of the national and personal factors in the situation which cannot well be obtained by correspondence or indirect communications. With this further knowledge in their possession the representatives of each Government in consultation with their colleagues and their respective Parliaments, are in the best of positions to formulate policies on questions where co-operation is required.'

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[5] *The Times,* January 29, 1957.

The Imperial Conference was first created in 1907, but even thirty years later, *i.e.*, at the time Mr. Mackenzie King made the statement just referred to, the Dominions were suspicious of the Conference, although, as his statement showed, the Conference did not impinge on the autonomy of the Dominions, as they were then called.

At the present time there is almost daily detailed explanations and advance information of a highly confidential nature on Government policy between the respective Governments and High Commissioners in each of the capitals of the member nations. These almost daily contacts form the life-blood of the Commonwealth. So much so, that the failure of the British Government to maintain them over the action it contemplated concerning the Suez Canal, coupled with the action it did, in fact, take, brought the Commonwealth to the verge of dissolution. The United Kingdom—the heart of the Commonwealth—had temporarily stopped functioning in an important matter and had temporarily partially paralysed the Commonwealth. Mr. Lester Pearson, the Canadian Minister of External Affairs, told the Canadian House of Commons on November 27, 1956, that at one time after the Anglo-French landings in Egypt, the Commonwealth was on the verge of dissolution. He maintained that his Government's position on the Suez crisis had been made clear to Whitehall in a number of messages during the summer, and added that Canada a week or two before the Israel attack on Egypt had no knowledge conveyed to her of any acute deterioration of the situation nor any knowledge or information about anything which could be called a Russian plot to seize Egypt and take over the Middle East.[6] Mr. Lester Pearson clarified this statement on December 2, 1956, by saying that he had Asian members in mind when stating that the Commonwealth was on the verge of dissolution. He said he feared that if the fighting had continued in Egypt it would have been difficult for India to have remained in the Commonwealth, and that if India withdrew, Pakistan and Ceylon also might have done so.

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[6] *The Times*, November 28, 1956.

There never was any danger, he said, that the association of the older members of the Commonwealth, such as Canada, Australia, Britain and New Zealand, would have broken up.[7]

Sir Eric Harrison, Australian High Commissioner in London, stated at a Press Conference on December 5, 1956, that while firmly reinforcing the view of his Prime Minister that at times of crisis Britain would be justified in taking action without fully consulting members of the Commonwealth, he also envisaged the creation of permanent machinery in London which would enable such consultations to take place on the spot with, perhaps, Commonwealth representatives fully empowered as delegates to take decisions on behalf of their countries.[8]

Meetings are held from time to time of Ministers concerned with particular subjects. Thus, a Commonwealth Conference was held in Australia in 1947 to discuss the terms of a peace treaty with Japan. The Commonwealth Finance Ministers met in London in 1949 and 1952, and in Australia in 1954. A Commonwealth Economic Conference was held in 1952, while in 1950 the Foreign Ministers met in Colombo to review economic and political problems of South Asia and South-East Asia, this being the meeting at which the Colombo Plan came into existence. In 1951 meetings took place of Defence Ministers and Supply Ministers.

Over and above all these are the Conferences of Commonwealth Prime Ministers, seven of which have been held during the post-war period and which have superseded the Imperial Conferences. But, as with the Imperial Conference, the function of the Conference of Commonwealth Prime Ministers is not to formulate or declare policy but to inform.

Having regard to the importance of the matters discussed by the Prime Ministers at their Conferences the procedure is surprisingly informal. One gathers that the meetings are conducted in as nearly as possible the informal atmosphere of a Cabinet meeting, and that there is no fixed agenda, just an agenda in general terms. As indicated above, no resolutions are passed, and no obligations incurred as a result of the meetings. When one reflects that the future of 630,000,000 persons are directly affected by the matters discussed at the Conferences one has the uncomfortable feeling that Commonwealth relationships and matters are seriously in need of a complete overhaul.

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[7] *The Times*, December 4, 1956.

[8] *The Times*, December 12, 1956.

For example, the official statement issued after the 1956 Conference records that 'The Prime Ministers considered the situation in the Middle East. They reaffirmed their interest in the peace and stability of this area. They welcomed the efforts of the Secretary-General of the United Nations to ensure observance of the terms of the armistice agreements between Israel and the neighbouring Arab States. They agreed that all practicable steps should be urgently taken to consolidate the progress thus made and to seek a lasting settlement of the dispute.'

Now the peace and stability of the Middle East are, as recent events have shown only too clearly, of the utmost importance to the Commonwealth, and the Commonwealth Prime Ministers were, of course, aware of this fact. Did they just talk about the matter? Did they go a step farther and decide upon the action to be taken to protect the interests of the Commonwealth should circumstances demand action? These surely are pertinent questions in the light of the assertion in the official statement that 'the common understanding which the Prime Ministers have reached in their review will form a valuable background which will assist each Government in their formulation and pursuit of its national policies.' Which is of the greater importance, the development and strengthening of the Commonwealth, or the pursuit of national policies? One feels that member nations of the Commonwealth still cling to outmoded ideas of sovereignty and are not prepared to accept limitations of their sovereignty *vis-à-vis* their partners because so to do would, they think, be a blow to national prestige.

No country in the world is able to stand completely alone. Surely where Commonwealth interests, as such, are concerned, each member nation must be willing to share its sovereignty with all its partners in the Commonwealth for the benefit of the entire Commonwealth? The world of 1957 is vastly different from that of 1937. Is it not now essential for those responsible for governing the Commonwealth to formulate and declare policies for the Commonwealth, as such, and in the name of the Queen, as the Head of the Commonwealth, to carry out such policies?

Take defence of the Commonwealth. Should there not be a Commonwealth policy binding on all parts of the Commonwealth? Surely membership of the Commonwealth should carry with it duties as well as privileges? If the Commonwealth, as such, needs bases in some part of the Commonwealth, say Ceylon, then should not those facilities be placed, readily and willingly, at the disposal of the Commonwealth?

It is true that defence of the Commonwealth, which at one time was an essential part of the Commonwealth bond, has now become to a considerable extent a matter to be dealt with by member nations through the international agreements they have individually entered into. But it would be folly to regard the regional defence arrangements of the North Atlantic Treaty Organisation, the South-East Asia Treaty Organisation, the Pacific Council of Australia, New Zealand and the United States, and the Baghdad Pact, as having made it unnecessary any longer to consider the defence of the Commonwealth as a matter for the Commonwealth. Air communications illustrate the point. British air communications with the Far East at present depend entirely on the good will of two member nations of the Commonwealth—India and Ceylon—both of which have clearly indicated that they will remain neutral in events which they do not wish to interest them. Because of the great uncertainty concerning the future enjoyment of the Indian facilities, and the wish of Ceylon that the United Kingdom should cease using the existing facilities in Ceylon, the United Kingdom has, as the Commonwealth Relations Office announced on January 3, 1957, agreed with the Maldivian Government to re-establish and operate the airfield in Addu Atoll. This will enable aircraft to fly from the Middle East to the Far East without flying over, or refuelling in, any other country. In this way the United Kingdom has been able to safeguard air communications with Australia, New Zealand and other territories of the Commonwealth in the Far East, and has once again demonstrated British initiative in Commonwealth matters. But it is regrettable that these arrangements have had to be made because of the attitude of two members of the Commonwealth.

Of course, Commonwealth necessities would only be decided upon after full consultation with the territory concerned. That is, if bases are needed in a territory which is not a full member of the Commonwealth—for example, Malta, Cyprus or Singapore—such territory should be fully consulted before the decision is made. Of course, in the case of a full member, it must be fully consulted. The territory concerned should be bound by a majority decision.

Has not the flexibility or elasticity associated with Commonwealth relationships become a danger to the Commonwealth? Is it not imperative for Commonwealth relationships to be drastically overhauled? Mr. Nehru, the Prime Minister of India, speaking in the Upper House of Parliament on December 7, 1956, said there was nothing in India's association with the Commonwealth which limited India's independence. Is that attitude fair and just to India's partners in the Commonwealth?

If one is right in thinking that there are matters of vital concern or importance to the Commonwealth as such, then a Commonwealth policy in relation to them should be formulated by the Commonwealth and carried out by the most appropriate members of the Commonwealth. If unanimity cannot be reached, then the majority view should prevail. It is realised that this would be a fundamental departure from what has always been the practice in, or basis of, Commonwealth relationships, but world conditions make it imperative for Commonwealth leaders to think 'Commonwealth,' and to have a policy for the Commonwealth as one unit.

## COMMONWEALTH RESOURCES

A motion moved in the British House of Commons on November 30, 1956, by Sir Albert Braithwaite urged the Government to invite the other members of the Commonwealth to join in the setting up of Commonwealth machinery for the purpose of developing the natural resources throughout the Commonwealth and in the colonial territories. Sir Albert Braithwaite said, in the course of the debate, that in Commonwealth affairs the time had come for a major change of plan. The grown-up parts of the Commonwealth should come in as partners and take a load off Britain's responsibility. He advocated the setting up of a Commonwealth development council with representation from all parts of the Commonwealth, to sit as a statutory body to examine schemes and give out priorities. Under that Council there should be a proper finance organisation. He said there is unlimited coal available in Tanganyika and resources in Rhodesia, and that the valuable find of oil in Nigeria should be exploited. In

Alberta there is a great deposit of star sand which contains the largest known volume of oil reserves in the world which could be economically obtained. Mr. Braine, in the same debate, said it is impossible to justify the practice whereby the British Treasury nullifies the concessions which colonial Governments have made to encourage development.

Lord John Hope, then Under-Secretary, Commonwealth Relations, replying to the debate, said he would like to examine the suggestion for a Commonwealth bank. The proposal that the Colonial Development Corporation should be expanded to include Commonwealth development would be unworkable. There could not be, he said, the same statutory organisation handling the development for territories for which the British Government are responsible and for those countries which are independent. This attitude of the British Government is evident in the cases of Ghana and the Federation of Malaya.

When moving the second reading of the Ghana Independence Bill in the House of Commons on December 12, 1956, Lord John Hope said the Bill provided that no further schemes should be made for Ghana under the Colonial Development and Welfare Acts, 1940–55. Ghana, too, would no longer come within the scope of the Colonial Development Corporation's activities when she became independent. The British Government recognised that there might be a period during which the new nation could not have as ready an appeal for investment as it would after it had found its feet and proved itself. The British Government, he said, were considering this and would get into touch with other members of the Commonwealth on the basis of the constructive suggestion made in the debate (mentioned above) on November 30, 1956, for a joint Commonwealth approach to this problem.

Tunku Abdul Rahman, Chief Minister of the Federation of Malaya, stated in Singapore on January 18, 1957, on his return from London that he was promised limited grants for mainly military purposes but failed to get a Government to Government Loan. The Federation, he was told, is to receive towards economic development the unspent balance at the date of independence of the Federation of Colonial Development and Welfare allocation, and he was advised to turn to the London market and other sources for a loan.

The official statement issued after the 1956 Conference of

Commonwealth Prime Ministers records that the Commonwealth Prime Ministers noted with satisfaction the United Kingdom's determination to maintain and improve its capacity to serve as a source of capital for development in Commonwealth countries, and that they received reports on the development programmes of certain members of the Commonwealth. How does the United Kingdom intend to carry out its said determination? By looking at Commonwealth development from the point of view of development of the Commonwealth as a whole, which will require the full co-operation of all members—full and otherwise—of the Commonwealth, or as a matter which has to be split into two parts, one covering development in the full member nations, for which the full members will seek the co-operation of the United Kingdom, and the other dealing with development in the other territories of the Commonwealth, where co-operation with the full member nations will not, constitutionally, be essential?

One feels that Ghana has developed politically far more than she has economically, and it may even be that, economically, she is unable at the present time to support fully-responsible status within the Commonwealth. If that is so, then although the Ghana Independence Act, 1957, may be regarded as a welcome break with the traditional view or principle that fully-responsible status within the Commonwealth could only be granted if the territory were economically able to support that status, it should at the same time be realised that departure from this principle carries with it disadvantages from the economic point of view, particularly as regards security for investment. It makes it essential that the Gold Coast (Ghana) and any other territory which follows in Ghana's footsteps, for example, Malaya and the Caribbean Federation, must give sound guarantees for capital investment in the territory.

Mr. Maclay, then Minister of State, Colonial Office, in the course of the debate in the British House of Commons on December 18, 1956, at the committee stage of the Ghana Independence Bill, said that the British Government intended to consult other members of the Commonwealth about setting up some new machinery so that new resources could be found and channelled to the new members of the Commonwealth. The Ghana Government would have recourse to the London market for loans which would have trustee status, and would also be eligible for membership of the International Bank and the International Monetary Fund. She would have available the finance and industrial advisory service, as well as loans from the Commonwealth Development and Finance Corporation. There would be no vacuum in financial support for the territory.

An indication that Canada is thinking of the Commonwealth in practical terms is shown by what Mr. Lester Pearson said in the course of his speech on world affairs made in the Canadian Parliament on January 16, 1957. He made clear that Canada supported the Commonwealth association. He compared Soviet methods, as instanced in Hungary, with Commonwealth conduct, and considered it to be most important that this conduct should be maintained in view of the advancement in status of some members of the Commonwealth. Ghana would soon become an independent nation, and, said Mr. Pearson, her progress would be watched with great interest in Africa, Asia and Russia. Others, like Nigeria and the Caribbean Federation, would follow. Canada as an older member of the Commonwealth was proud to welcome these young countries. Some observers hoped that Canada would help to increase confidence of these new members by investing in their local economic projects.

Lord Home, Lord President of the Council and Secretary of State for Commonwealth Relations, announced in the House of Lords on April 2, 1957, that a scheme of mutual technical assistance had been agreed in principle, between the Governments of the United Kingdom and Ghana. The United Kingdom Government contemplate that under the scheme officers nominated by the Government of Ghana from among their younger public servants will come to the United Kingdom at the latter's expense for training in practical and technical subjects, and the United Kingdom Government will also be ready to supply the Government of Ghana with experts to fill specialist, technical and professional posts of a temporary or advisory nature, the costs of such experts being shared between the two Governments. On their side, the Government of Ghana have indicated their readiness to provide reciprocal assistance in fields in which they are able to make a significant contribution, for example, in the study of scientific and technical problems of concern to the United Kingdom and the Colonies.

A similar announcement was made in the House of Commons by Mr. Alport, Parliamentary Under-Secretary of State for Commonwealth Relations, on the same day, who added that if any members of the Commonwealth felt able to associate themselves with it he was certain that their help would be welcome in countries like Ghana, who wished to avail themselves of such help.

The United Kingdom, as one would expect, is playing a leading role in the economic betterment of South-East Asia and Southern Asia. The fifth annual Colombo Plan Reports,[9] published on January 15, 1957, estimates that over £3,000 millions will have been spent on development in the first six years of the Plan. The estimated expenditure on public development for the whole area in 1956–57 was over £1,000 millions, India's share of which was over £620 millions. The net investment by British enterprise in India between the middle of 1948 and the end of 1953, including reinvested earnings, was estimated at just over £100 millions, and the British Government had also contributed about £86 millions to the Colombo Plan area since 1951. The million-ton steel plant to be built at Durgapur, India, will be built by British manufacturers, and the British Government and banks together are lending £26½ millions towards the cost. Obviously solid practical benefits flow from membership of the Commonwealth.

The annual report for the Colonial Territories for 1955–56[10] shows that loans raised on the London loan market during that year for capital investment in the Colonies totalled about £14 millions, and that capital approved by the Colonial Development Corporation schemes during that year totalled over £8 millions, bringing the total capital sanctioned at the end of March, 1956, to £65 millions.

The Maltese Central Office of Information stated on December 31, 1956, that the British Admiralty is to build a £6 millions oil store in Malta to provide emergency fuel reserves for the Services and the civil Government. This project will provide employment for about 1,000 Maltese for three and a half years.

Admirable as all these schemes and projects are—and they are examples only, and do not constitute the full list—what is wanted is a Commonwealth plan designed to make the best use of the resources of the Commonwealth, which are spread over one-fifth of the land area of the world. This is a task which should be undertaken without any delay.

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[9] Colombo Plan, *Fifth Annual Report,* Cmnd. 50, H.M.S.O.
[10] Cmd. 9769, H.M.S.O.

## FINAL OBSERVATIONS

What is written above only hints at some of the difficulties already existing in the Commonwealth and at those which may possibly arise in the future. Further sources of difficulty are the dispute between India and Pakistan over Kashmir, the strained relations between India and Ceylon on the one hand and South Africa on the other, and the fundamental differences between the United Kingdom and South Africa over the High Commission Territories of Basutoland, Swaziland and Bechuanaland, and the United Kingdom policy of self-government for her African territories.

But in spite of these difficulties the member nations still consult together, and exchange views, on matters of common concern. As perhaps one would expect, they find it easier to agree on economic issues than on political matters. But it is in the latter sphere that the greatest danger to the Commonwealth lies.

The extension of Commonwealth membership to Asian and African countries has made inevitable a comprehensive review of Commonwealth relationships, and the Prime Ministers of the Commonwealth would be rendering, not only to the Commonwealth but also to the world, services of incalculable value if they instigated such an investigation.

Mr. Shinwell, when speaking in the debate on the second reading of the Empire Settlement Bill in the British House of Commons on January 26, 1957, said that the first thing to do about Commonwealth relations is to establish adequate machinery for consultation. What was wanted, he said, is a permanent organisation established in some part of the Commonwealth which would keep all matters relating to Commonwealth affairs under review. Members of the Governments concerned, members of the House of Commons, and people from outside, could be brought in to offer their view and guidance to a body charged with the responsibility of injecting realism into Commonwealth relations.

There should also, it is suggested, be a complete overhaul of the Commonwealth Relations Office and the Colonial Office in the United Kingdom. It has been pointed out above that surely the time has arrived for the Commonwealth to be thought of as one unit and that there should no longer be such a strong line of demarcation between member nations on the one hand and other territories in the Commonwealth on the other. An Office merely dealing with Commonwealth Relations is totally inadequate in the light of present conditions and, further, it is psychologically unwise to adopt such a rigid attitude that a territory in the Commonwealth which has not attained full membership should be kept at bay so far as the Commonwealth Relations Office is concerned. There should be one Commonwealth Office, the political head of which should have full executive authority, as far as the United Kingdom is concerned, covering all Commonwealth matters, including foreign aspects, no matter whether they affect full members or any other territory in the Commonwealth.

To take one matter. Whilst it is appreciated that meetings of Commonwealth Prime Ministers must, on the whole, be held in private, surely there are some Commonwealth matters which can be discussed in public sessions? There is too much secrecy surrounding the Conferences, and the position is not improved by the sort of official statements that are issued after the Conferences. The official statement issued after the 1956 Conference is pedestrian and quite unworthy to rank as a public record of a Conference of such tremendous importance.

The expansion of Commonwealth membership has introduced new psychological factors. At one time the best way of holding a Conference of Commonwealth Prime Ministers might have been merely to have a general, or even no, agenda, and for the meetings themselves to be as informal as possible, with no publicity whatever. But a different type of political leader has appeared on the scene, and procedures which may have been appropriate, say, twenty years ago, are no longer so. Moreover, the peoples of the Commonwealth are entitled to be properly informed. Should not the agenda for a Conference of Commonwealth Prime Ministers be agreed by the participants and published in the national press before the Conference begins, with appropriate items on the agenda being discussed in public sessions? Should not binding decisions be arrived at by the Prime Ministers? This tightening-up of the procedure and the introduction, to a limited extent, of publicity would probably lead to the formulation of a positive Commonwealth policy and would, at any rate, enable the peoples of the Commonwealth to gain some idea of what is being done in their name and why it is being done.

It has been said that the Commonwealth is a society for mutual support. That is far from being the case in political matters, but true, on the whole, as regards economic matters. This shift in Commonwealth relationships ought, it is suggested, to have made it easier for the Prime Ministers to give some real information concerning the decisions they arrive at on Commonwealth affairs.

Suggestions are sometimes made that foreign countries might be admitted to membership of the Commonwealth. Now that is more easily said than achieved. We have seen that the consent of all the member nations is required for the admission of a new member. It is most probable that members, if called upon to consider an application for admission from a foreign country, would throw their minds forward and try to envisage the Commonwealth as it would exist if the foreign country had been admitted. This would involve consideration of both political and economic factors.

The official statement issued after the 1956 Conference of Commonwealth Prime Ministers states that the peoples of the Commonwealth 'all share the common heritage of parliamentary democracy.' The working of the Commonwealth depends upon convention and not law. It is true that some of the conventions have been declared in statute law, but that has been done without altering their character. Political leaders of European countries—it is from Europe that one would expect most candidates for admission—work in and against a constitutional atmosphere and background so different from that of Commonwealth countries that one doubts if they would, notwithstanding their earnest and sincere desire so to do, be able to attune themselves to the illogicalities of the Commonwealth association. Harmony in the Commonwealth, which even now is not easily achieved, would become much more difficult of achievement if the membership of the Commonwealth were extended to include foreign countries, unless of course fundamental changes are made in Commonwealth relations. If, for example, members were prepared to concede that complete autonomy in external affairs—that autonomy associated with the Balfour Declaration of 1926—is outdated in the world as we now know it, and were prepared, so far as the Commonwealth is concerned, to act accordingly, that is to limit their national sovereignty for Commonwealth purposes, the Commonwealth association would become more definite and logical, and thus more capable of being understood by foreign countries. But expansion of the Commonwealth by admitting foreign countries before fundamental changes are made, would, it is submitted, be courting disaster for the Commonwealth.

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# THE CONSTITUTIONAL CHALLENGE OF CYPRUS AND SINGAPORE

DENYS C. HOLLAND

THIS is a sad story of two islands which, although geographically far apart, present the United Kingdom Government with a common constitutional challenge. In both Cyprus and Singapore there is a multi-racial community: in Cyprus 80 per cent. of the population are Greek Cypriots, 18 per cent. Turkish Cypriots and the remaining 2 per cent. Armenians, Maronites, British residents and others[1]; in Singapore the great majority are Chinese, with minorities of Indians, Pakistanis, Malaysians, British residents, Eurasians and others.[2] In both islands the members of the majority race have a spiritual and cultural affinity with the people of a nation outside the British Commonwealth, although the attraction of Greece for the Greek Cypriots is more apparent at the moment than that of China for the Chinese inhabitants of Singapore. Finally both islands are regarded by the British Government as important for the defence of United Kingdom interests. The constitutional problems facing the British Government within the two islands are thus largely similar.

## CYPRUS

### (1) *History*

In order to appreciate the constitutional problems now affecting Cyprus it is necessary first to say something about the geographical situation and history of the island, although this can only be done briefly here.

Cyprus is situated forty miles from Turkey, seven hundred miles from Greece and two hundred and forty miles from Egypt. It has a long history involving a continuous procession of peoples who have conquered the island for their own commercial or strategic purposes—Egyptians, Hittites, Greeks, Phœnicians, Assyrians, Persians, Macedonians, Romans, Byzantines, Turks, Venetians and British. Research has in fact carried its history back to 3700 B.C. For present purposes, however, it is sufficient to go back to 1189, not because this is the limit of legal memory, but because this was the year in which the island came under Greek ownership for the first and (so far) last time; in that year it came under the control of Isaac Comnenos. However, it remained in Greek hands for two years only, for in 1191 Richard Coeur de Lion captured it. He almost immediately sold it to the Knights Templar who, in their turn, sold it almost at once to one Guy de Lusignan. The House of Lusignan ruled the island until 1489. It was recently reported that one Charles Roux de Lusignan intended to claim that Cyprus legally belonged to him as a descendant of Guy de Lusignan, and had engaged two lawyers to draft a petition to this effect to the United Nations and to the Queen.[3] Such a claim, if successful, might provide a simple solution to the problem of the future of Cyprus, but, perhaps unfortunately, it seems unlikely that this claim would be upheld in international law. In 1489 Cyprus fell to Venice, which held it till 1571 when it fell to the Turks. The Turks in their turn ruled Cyprus until 1878. In that year the island passed under British administration in return for a promise by Britain to help Turkey against Russia; the territory, however, remained nominally Turkish and its inhabitants Turkish subjects. On the outbreak of war in 1914 Great Britain annexed the island; in 1923 this annexation was formally recognised by the Treaty of Lausanne; and in 1925 Cyprus became a Crown Colony.

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[1] These figures are based on the 1946 Census; see *Constitutional Proposals for Cyprus,* Cmnd. 42 (1956), p. 12.

[2] See *Singapore Annual Report,* 1954, p. 8.

### (2) *The issues involved*

Here then we have an island which is seven hundred miles distance from Greece and which has not belonged to Greece since 1191. What possible basis can there be, it may well be asked, for a claim by Greece to ownership of the island? Put in this form, however, as it sometimes is, the issue is mis-stated. What is in issue is not a Greek claim to ownership of Cyprus, but a Cypriot claim for union with Greece. The issue, or rather one of them, is in other words the right of the Cypriots to self-determination—a principle which has been recognised in general terms by the United Nations. This then is one of the issues. The other issues are the protection of the interests of the Turkish Cypriot minority, the protection of the interests of Turkey which, as stated above, is only forty miles away, and the protection of British interests. The question is whether these interests can be reconciled within a Constitution, and, if not, which of them should be regarded as predominant and entitled to prevail. These issues must, therefore, be examined in turn.

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[3] *The Sunday Dispatch,* September 23, 1956.

(a) *Self-determination—Enosis.* Much confusion surrounds this issue, and in order to clarify it, it is necessary to inquire when the Enosis movement started, whether it is genuine and whether self-determination should be regarded as the overriding principle to which all other interests must give way if reconciliation between them should prove impossible.

It seems reasonably clear that the Enosis movement is not a recent development as has sometimes been alleged. In 1878 when the British first landed in Cyprus they were met by a deputation of bishops who expressed their 'trust that Britain would help Cyprus as it had helped the Ionian Islands to be united with Mother Greece with which it is nationally connected.' At that time the British Government replied that this matter could not be discussed because Cyprus, although administered by Britain, was still technically Turkish territory. From that time onwards the movement has continued, although naturally its intensity has varied from time to time. And it may be added that until recently the British Government has done nothing to discourage the belief that Enosis would ultimately be achieved. In 1897 Gladstone said he would feel great satisfaction if it were granted to him before the close of his life 'to see the population of that Hellenic Island placed by friendly arrangement in organic union with their brothers of the Kingdom of Greece.' And ten years later Sir Winston Churchill said that it was only natural that 'the Cypriot people, who are of Greek descent, should regard their incorporation with what might be called their mother country as an ideal to be earnestly, devoutly and fervently cherished.' But, as both pointed out, the island was still technically a part of the Sultan's dominions and so was not Britain's to give. However, in 1914, as stated already, Britain annexed Cyprus, and the next year offered the island to Greece on condition that Greece entered the war. Greece, however, did not enter the war until 1917, and it was then maintained by the British Government that the offer had lapsed. The offer has not been renewed since.

The cry for Enosis is not then a recent development. It may still be questioned, however, and has been questioned, whether the cry is a genuine one. The Cypriots say they want union with Greece, but is it really so? Recently, for example, the Secretary of State for the colonies quoted the emigration figure from Cyprus to Greece and Britain. He stated[4] that between January 1955 and April 1956 between 5,000 and 6,000 Cypriots had emigrated to Britain, whilst over the last five years the emigrants to Greece had numbered five in each of the years 1952, 1953 and 1954, none at all in 1955 and one in 1956 up to the date of his statement. The number of emigrants to the Seychelles was not given. Presumably the implication of these figures was that the Cypriots did not really want union with Greece at all. In addition ethnological experts have doubted whether the Cypriots are Greek by race; it has been suggested that in character and appearance they have more in common with the Anotolians. On the other hand in 1931 the then Governor of Cyprus, Sir Ronald Storrs, stated: 'The Greekness of the Cypriots is indisputable. No sensible person would deny that the Cypriot is Greek speaking, Greek thinking, and Greek feeling.'

Despite the doubts that exist as to whether the Greek Cypriots are Greek by race, it seems abundantly clear that they are indeed Greek thinking and Greek feeling, as Sir Ronald Storrs pointed out. They clearly regard Athens as their spiritual and cultural home, although it may well be that—and the immigration figure would seem to support this view—their commercial interests lie in London. The cultural and spiritual attraction of Greece would appear to be due to a great extent to the influence of the Church and the schools in Cyprus. It will be recalled that it was the bishops who presented the request for Enosis when the British took over the administration of the island in 1878. And there is abundant evidence that the Church has been in the vanguard of the movement ever since. So, too, with the schools. In this latter connection it may be of some interest to note that not long after the British took over the administration of the island in 1878 the High Commissioner, Sir Robert Biddulph urged that education in the schools should be in the English language, but Gladstone and his Government overruled him. The result has been that the schools, with a curriculum based on that of the Greek gymnasium, have always been centres of Greek nationalism. It may well be that if the influence and power of the Church and the schools had been curtailed, or at least controlled by the British Government at the outset, the desire for Enosis would have died out in the course of time. None-the-less, whatever the cause of, and whatever the wisdom of, the desire for Enosis, it clearly does exist, and has to be answered.

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[4] *Parl. Deb., Official Report,* House of Commons, Vol. 556, col. 1523.

This leads to the question whether the principle of self-determination should be conceded even if it involves the overriding of the interests of the United Kingdom, Turkey, and the Turkish Cypriots. For some people the principle of self-determination has become almost a religion. All else is regarded as secondary to the rule of the majority. It is hoped that honesty, efficiency and respect for minority rights will follow, but these are hopes only. In the last resort the upholders of self-determination would apparently prefer an inefficient, corrupt and tyrannical government chosen by the majority, to a State where standards of efficiency, honesty and fairness are imposed upon the majority by a minority. Thus, in a recent article on Cyprus[5] Lena Jeger, M.P., after stating that the usual arguments against Enosis are that Greece is reactionary, that the power of the Church should not be encouraged, that there are strategic considerations, and that the standard of living might be lowered, states: 'The advancing of the reasons is itself evidence of colonialism in thinking about the problem. "It is for us to decide," was the usual answer in Cyprus . . . "It is no business of yours," said another, "if we are prepared to risk prison. That is our decision and ours alone."'

This, of course, is a view which the self-determinists are perfectly entitled to hold, if they wish, but for my part I find it difficult to understand why such a high value should be placed upon government by consent of the majority. Government by consent of the majority is undoubtedly an important principle, but why all else should be secondary to it is not so obvious. It is difficult also to see why the principle of self-determination should be applied only at the national level, if in fact it has such

[5] 'What next in Cyprus?' *Venture* (April, 1955), pp. 1–2.

overriding value. Why is not the principle of self-determination applied by the self-determinists to particular individuals, the inhabitants of particular villages or towns, to particular races or to whole continents? That it is not conceded at these other levels is shown by the opposition which proposals for partitioning Cyprus have aroused amongst the self-determinists. It is obvious that in fact even the self-determinists recognise that in upholding self-determination account must be taken of geographical, economic, strategic and other factors. Otherwise they would not limit the application of the principle to the national level as they do.

Whether national self-determination is of overriding importance must be ultimately a matter of opinion. But if it is to be conceded, most people, although by no means all,[6] would agree that steps should be taken, so far as is possible, to protect the rights of minorities within the territory concerned, and also to protect the interests of international society by ensuring that the legitimate interests of other States are not threatened.

(b) *Protection of Minorities.* There are many constitutional devices available for protecting minority rights, all of which have certain merits and demerits and none of which can provide any guarantee of protection once a State is an independent self-governing entity in the absence of an organised international society. It is not my purpose here to suggest which is the correct solution, a matter which must be one of opinion, but my intention is merely to draw attention to some of the principal means available.

The means most commonly used by colonial powers has been the communal franchise by which communities are represented in the legislature, not by reference to geographical areas, but by reference to race. The disadvantage of this is that, whilst for the present it provides a reasonably effective protection for the different communities, it may have the effect of exaggerating racial differences and thus delaying the development of a sense of national unity indefinitely. Each race naturally tends to elect representatives who will look after its own interests rather than the national interest, and there is thus a danger of racial extremists being returned to the legislature.

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[6] See, for example, *A policy for Colonial Freedom,* published by the Movement for Colonial Freedom, where it is stated at p. 7: 'Britain itself is a multi-racial community, but no one has yet suggested that Africans, Cypriots, Italians, Poles and other racial groups residing here should have special representation in the House of Commons or special rights before the law. Everyone has the right to equality in society, but it is for the minorities to adjust themselves to the circumstances of the majority!'

To minimise this risk there are certain variations of the communal franchise which might be used, but which suffer from the disadvantage of being comparatively more complex. Instead of each community merely voting for a representative of its own race who would be a member of that race, it is possible to give each race some say in the election of every member in order to try to ensure the return of moderates. Thus, for example, a possible system of communal franchise is one by which each community votes for two candidates—one of his own race and one of the other race; the winning candidates are those who receive the most votes and who also receive at least 10 per cent of the votes cast by their own community. Another possible variation is that each community is faced with the same list of candidates who may be of either race, all the votes are counted together, and the candidate with the most votes is declared elected provided that he gets at least 10 per cent of the votes cast by each community.

The communal vote, whatever form it takes, is not, however, generally regarded as a long term solution, but merely as a short term device for protecting minority rights. Amongst other variations in the franchise of a more long term nature which exist as a means of protecting minority rights, the most common are weighting, the cumulative vote, and proportional representation. Of these weighting is, of course, only possible where the minorities are concentrated in particular areas, and the cumulative vote and proportional representation suffer from the disadvantage of extreme complexity.

A device which has been much advocated by the Turkish community in Cyprus is the creation of a bicameral legislature as a means of protecting the minority. Dr. Kuchuk, the Turkish Cypriot urged this device not long ago,[7] suggesting that there should be an Upper House in Cyprus in which the Turkish community would have equal representation with the Greeks and which would have a veto on legislation proposed by the Lower

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[7] See *The Times,* June 30, 1956.

House. The adoption of such a proposal would clearly mean that the Turkish community in Cyprus could block indefinitely any proposal put forward by a Greek elected majority and so prevent any possibility of Enosis ever being achieved constitutionally. More recently the Turkish Cypriots have varied this proposal, pressing instead for equal representation in a unicameral legislature, despite the fact that numerically they comprise only 18 per cent of the population of Cyprus. Proposals for equal representation in a unicameral, or more appropriately a bicameral legislature, would, of course, be more acceptable if a federal form of constitution could be devised, but in the absence of a pattern of territorial separation between Turkish and Greek Cypriots this seems quite impracticable.

All the proposals mentioned above are concerned with the composition of the legislature. Special representation may, of course, also be devised at the executive level of government, usually by the preservation of particular executive posts for representatives of the minorities. A more unusual executive device for multi-racial communities is that which the late L. S. Amery suggested, namely to adopt the Swiss system under which the executive is elected by both houses of the legislature by the single transferable vote, thereby increasing the chances of the executive being composed of moderates.

Finally mention must be made of the possibility of protecting minorities by inserting in the constitution a provision limiting the powers of the legislature. A typical example of this is provided by the Constitution of Ceylon which contains a clause declaring void any law which imposes on persons of any community disabilities or restrictions to which persons of other communities are not made liable or which confers on persons of any community any privileges which are not conferred on persons of other communities. Similar limitations on the powers of the executive may, of course, also be imposed.

All these various methods of protecting minorities have been fully examined recently in relation to conditions in Cyprus by Lord Radcliffe who was appointed on September 13, 1956, 'to make recommendations as to the form of a new Constitution for Cyprus which shall . . . contain such reservations, provisions and guarantees as may be necessary to give a just protection to the special interests of the various communities, religions and races on the island.' In his Report published in December 1956,[8] Lord Radcliffe recommends that in order to protect the special interests of the Turkish Cypriot community: (a) There should be six seats in the Legislative Assembly reserved for members elected on a separate roll of Turkish Cypriot voters. The other members of the Legislature, he recommends, should be twenty-four members elected by voters on a general roll from which the Turkish Cypriots would be excluded, six members nominated by the Governor and a Speaker and Deputy Speaker. (b) The consent of two-thirds of the Turkish Cypriot members should be necessary for any law altering the existing provisions regulating the family system of the Turkish Cypriot, marriage, divorce, Evkaf, Vakfs, etc., or which deals with their educational, religious, charitable, or cultural institutions; the Turkish Cypriot community for their part, on the other hand, would be able to invite the Governor to make laws dealing with such matters, if they desired such legislation and the Legislature itself was unwilling to act. (c) There should be an Office of Turkish Cypriot Affairs under a Minister appointed by the Governor from amongst the Turkish Cypriot members of the Legislative Assembly. This Office would deal with all special affairs of the Turkish Cypriot community, including, for example, their educational system. (d) All legislation and all executive, civil, administrative acts and decisions (on the self-governing side) should be subject to the condition that they should not conflict with certain guaranteed rights relating to religion, education, charitable, religious and cultural institutions and use of languages, and should not discriminate on account of birth, nationality, language, race or religion. Complaints about violations of these rights would be to the Supreme Court in the case of legislative acts, and to the Tribunal of Guarantees in the case of administrative acts, the latter body having the power to award compensation as well as declare acts void. The membership of both the Supreme Court and the Tribunal of Guarantees, Lord Radcliffe recommends, should be so arranged that they include an equal number of Greek and Turkish Cypriots in addition to a Chief Justice in the one case, and a Chairman in the other, who is neither Greek Cypriot nor Turkish Cypriot.

Those are the major proposals put forward by Lord Radcliffe for the protection of minorities in Cyprus. In choosing these particular means of protection and rejecting others such as equal representation, a Second Chamber, or the variations on a strict communal franchise mentioned above, it appears from his Report that Lord Radcliffe had in mind three things: (1) the need to provide effective protection and not mere paper guarantees, (2) the need to ensure that the will of the majority is not denied over a field wider than the special community interests truly require, and (3) the desirability of choosing the simplest scheme possible. With these objects few would disagree.

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[8] Cmd. 42 (1956).

It is obvious that the mere existence of minorities is no insuperable obstacle to independence. There are ample constitutional means available for protecting minorities, and in the last resort, if all else fails, there is always the option of partition. Indeed if the mere existence of minority problems were a reason for refusing independence, India, Ceylon and Ghana, to mention only three territories, would still be British dependencies today. Whether any of the devices recommended by Lord Radcliffe or any other devices, short of partition, will solve the Turkish-Greek problem in Cyprus may, however, be regarded as doubtful. The conflict between the Greek Cypriot desire for union with Greece and the opposition of the Turkish Cypriots to that proposal, may be found to be insoluble by any means short of partition. It is obviously a solution to be avoided if possible because, as experience shows, the cost in human suffering is great, and it is rarely accepted as final by everybody, but Mr. Walter Elliot[9] pointed out in the House of Commons on July 19, 1956, and the Secretary of State for the Colonies reiterated recently,[10] it may be the only possible solution.

In the light of events in other parts of the British Commonwealth it would seem obvious that the real obstacle to self-determination in Cyprus is not the existence of minority communities, but the military requirements of the United Kingdom, which involve in addition the interests of Turkey, one of our allies in the Baghdad Pact.

(c) *The Defence Requirements of the United Kingdom and Turkey.* Self-determination can be reconciled with the interests of the Turkish Cypriot minority in Cyprus. The question remains whether it can be also reconciled with the defence needs of Turkey and the United Kingdom.

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[9] *Parl. Deb., Official Report,* House of Commons, Vol. 556, col. 1426.

[10] *ibid.,* Vol. 562, cols. 1271–83.

The Turkish Government have frequently made it clear that they have an interest in the future of Cyprus not only on account of the presence of a Turkish minority in Cyprus itself but also because Cyprus is only forty miles from the Turkish mainland and controls its Southern ports. It would seem inevitable that unless the Turkish Cypriots were given a right of veto, self-determination for Cyprus would lead to the union of Cyprus with Greece. Turkey, it is said, would then be faced with a situation where a potentially hostile power controlled its southern flank. It has been pointed out, however, that Turkey's fears could be relieved by any one or more of a number of steps consistent with self-determination for Cyprus—permanent demilitarisation of most of the island, a tripartite defence agreement, specific pledges to Turkey guaranteeing help in case of aggression. To this the Press Attaché at the Turkish Embassy in London has replied[11] that guarantees against aggression will not suffice because: 'Turkey does not fear aggression. What she insists on is that her main supply lines shall never be wholly dominated by a single potentially hostile power.' If this represents Turkey's firm attitude, then clearly self-determination for Cyprus cannot be reconciled with Turkey's expressed fears, although it may still be debatable whether it cannot be reconciled with Turkey's legitimate interests.

Finally there are the defence needs of the United Kingdom to be considered. The United Kingdom Government has consistently taken the view that Cyprus is essential to the defence of United Kingdom interests. The suggestion has been made that these interests could, however, be reconciled with the principle of self-determination by the provision of a NATO base on Cyprus, a concession which apparently would be readily granted by Greece if Cyprus is united with that country. To this, Mr. Selwyn Lloyd replied[12] in the House of Commons last year: 'It is not just a NATO question, but also of the Baghdad Pact and other treaty obligations in the Middle East, the protection of the oilfields and the Tripartite Declaration. A NATO base on Greek soil would not satisfy our needs. We cannot accept any doubt about the availability of facilities in Cyprus as and when we need them.' Mr. Julian Amery put the matter more explicitly perhaps when he stated in the same debate[13] that the 'NATO Treaty does not extend to the Middle East and, unfortunately, Anglo-American co-operation, which is fundamental to the good working of NATO, does not extend to the Middle East either' and added we 'cannot refer the question of Cyprus to an American dominated organisation.' In the light of these views expressed on July 19, 1956, the terms of reference laid down for Lord Radcliffe on September 13 naturally excluded any consideration of self-determination in Cyprus, requiring him to take account of the fact that 'during the period of the Constitution Cyprus is to remain under British sovereignty.'

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[11] *The Times*, August 23, 1956.

[12] *Parl. Deb., Official Report*, House of Commons, Vol. 536, col. 1413.

Since then, much water has passed under the bridge, if not through the Suez Canal. In the light of what has happened in Suez, it would seem difficult to uphold the argument that a NATO base will not suffice because the United Kingdom has oil interests in the Middle East, to protect which the United Kingdom may have to act alone. It would now seem clear that the United Kingdom cannot act alone—with or without Cyprus. However, it may be suggested that a base on Cyprus, as contrasted with Cyprus as a base, would still be insufficient if only for the reasons that Suez and Ceylon have shown that bases on foreign soil are precarious in the extreme. If this view be held it then becomes a question of either conceding self-determination at the risk of British interests or refusing self-determination in order to protect British interests. Which principle should then be regarded as predominant must be a matter of opinion.

But if the defence of United Kingdom interests be regarded as the predominant factor, then defence and external affairs must remain under British control. And since external security depends in some degree on internal security it follows that the United Kingdom must have some control over internal affairs also in these circumstances. In recognition of this fact, Lord Radcliffe's terms of reference specified that his recommendations as to the form of the new Constitution for Cyprus should be consistent with the requirement 'that all matters relating to external affairs, defence, and internal security are retained in the hands of Her Majesty's Government or the Governor.' It is in the

[13] *ibid.*, cols. 1450–1.

field of internal security that the greatest difficulty arises. External affairs may depend for their effective operation upon many internal matters—road communications, water supplies, port facilities, post office facilities, amongst other things. It is impossible to define with precision where responsibilities for internal security begin and end; there are bound to be marginal cases, and, therefore, there must be machinery to resolve cases of doubt. In relation to Cyprus Lord Radcliffe has proposed that the Governor alone should be responsible for deciding what is and what is not within the range of reserved subjects. The antagonism which this proposal might be expected to arouse will probably be alleviated only slightly by the further proposal that there should be a consultative body, to be known as the Joint Council of Cyprus, to keep 'the reserved side and the self-governing vote currently informed as to what the other is doing and, perhaps more important, what it proposes to do and why.' It is on this issue of internal security that constitutional progress in Singapore foundered in 1956, and for this reason it is perhaps appropriate at this stage to turn at last to the problems of Singapore.

## SINGAPORE

Unlike Cyprus, which since 1931 'has been governed without political institutions that can be described as responsible or elective,' Singapore has been making progress steadily towards democratic self-government for some years. Since 1955 there has existed a Legislative Assembly composed of a Speaker and thirty-two members, of whom twenty-five are popularly elected, and a Council of Ministers composed of three *ex officio* Ministers and six Ministers chosen from the Legislative Assembly, presided over by the Governor. Just one year later, in April 1956, a Conference opened in London to review the Constitution, and in particular to define internal self-government and to fix a date for its introduction. This Conference broke down on the one issue of internal security.[14] No mention was made, and indeed little mention has been made at any stage, of the two other problems which have been such thorns in Cyprus, namely, the danger involved in the majority community being racially connected with a nation outside the Commonwealth, and the necessity for protecting the minority communities. None-the-less there is evidence that the problems do exist, although they have not appeared on the surface to the same extent as in Cyprus. Thus, for example, there would appear to be some evidence that in Singapore Chinese schools, against which the Singapore Government have recently taken firm action, some attempt has been made to inspire loyalty for China.[15] It may well be this issue will appear in the political forefront in Singapore at a later stage of development. Again the existence of minority problems, at least in the making, is evident from the publication of such statements as that recently made by the Peoples Action Party of Singapore to the effect that in Malaya 'It is becoming clear that the Army and Gendarmerie will be predominantly, if not wholly, Malay, and that the Malay forces will be used to police predominantly Chinese squatters and workers.'[16]

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[14] See the *Report of the Singapore Constitutional Conference*, Cmd. 9777 (1956).

Nevertheless the public issue on which the 1956 Constitutional Conference broke down was merely internal security. Whilst both sides were agreed that the external defence of Singapore should remain the responsibility of the United Kingdom, no agreement was found possible concerning the responsibility for internal security on which external defence must clearly often depend. No amount of machinery for consultation on this issue can obscure the fact that somebody ultimately must have the power of decision. Since the area in which internal security may effect external defence is wide, it is clear that to leave the matter within the control of the United Kingdom Government is to make internal self-government a mockery. Yet the British Government cannot logically abdicate such control, except on the basis of trust, so long as it retains responsibility for external defence.

At the 1956 Singapore Constitutional Conference both sides finally agreed on the establishment of a Defence Council with equal numbers of Singapore and United Kingdom representatives plus a Chairman with a casting vote. But whereas the United Kingdom took the view that the Chairman must be a United Kingdom representative, the most the Singapore delegation was prepared to concede was that the Chairman should be a representative of neither side but appointed by some outside body such as the United Nations or the Government of Malaya (when it becomes independent). At the last moment the Chief Minister of Singapore attempted to prevent a breakdown by proposing that legislation enacted by the Defence Council should be subject to affirmative resolution of the House of Commons. This suggestion the Secretary of State for the Colonies refused to discuss because support was not given to it by the Singapore delegation as a whole. At the 1957 Singapore Constitutional Conference, however, what had been denied in 1956 was conceded: the internal Security Council will consist of three Singapore representatives, three United Kingdom representatives and a Minister from Malaya nominated by the Malayan Government. The price of this concession is the exclusion from the first legislature of persons who have engaged in subversive activities.

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[15] See, for example, an article in *The Times*, October 9, 1956, headed 'Struggle for Allegiance of Malaya's Chinese.'

[16] Reported in *The Times*, August 31, 1956.

## CONCLUSIONS

It would seem obvious that, although there are several issues in both Cyprus and Singapore, the essential issue which has brought about an impasse is the conflict between the desire of the inhabitants of those territories to control their own destiny and the desire of the United Kingdom Government to protect United Kingdom or Commonwealth interests. If it were not for the existence of this issue, all the other issues would doubtless be rapidly and easily solved. The question is whether it is possible to resolve this conflict by any constitutional means, short of one side or the other giving way. It is suggested that there are only two possible courses of development: the defeatist, and perhaps impracticable, course of partition, with certain areas remaining British territory; or an advance towards wider national units, whether by way of integration with the United Kingdom or other nations or by way of association of other States in the government of these territories. One might have hoped for a condominium in Cyprus involving the United Kingdom, Greece and Turkey, although the possibility of this seems remote in the present strained atmosphere. Concerning Singapore the United Kingdom Government have expressed the hope that the union of Singapore and Malaya 'in which context Her Majesty's Government have always hoped Singapore would find her full independence, might come about.'[17] So far, however, this has been resolutely opposed by the Malayan Government who obviously fear the swamping of the Malayan population by the Chinese majority in Singapore.

Perhaps by the time this paper appears in print a solution will have been reached in both islands. It is to be sincerely hoped so—even though this may mean that Cyprus and Singapore no longer present a current legal problem.

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[17] See Cmd. 9777 (1956), p. 24.

# 14

# THE FORMS OF SOVEREIGNTY

## AN ESSAY IN COMPARATIVE JURISPRUDENCE

GEORG SCHWARZENBERGER

> 'Is it the word we wish to throw out, or the concept, or the implications of the concept or the word?'
>
> CH. E. MERRIAM, *Systematic Politics* (1945)

THE place of sovereignty in present-day world society is somewhat enigmatic. It is a fashionable and, at a first glance, persuasive proposition to argue that, on the international level, independence is increasingly giving way to interdependence. In this atmosphere, sovereignty tends to be viewed with somewhat critical eyes. It is thought to be greatly overrated,[1] to suffer from regrettable ambiguities[2] and to show a reprehensible propensity to ideological abuse.[3]

Ample evidence of centripetal trends in international society exists. Centrifugal tendencies are not, however, inconspicuous. The call for closer international integration is matched only by the clamour for national self-determination. The cry for a world police force is paralleled only by the growing popularity of neutrality and neutralism, and so the tale of illustrations and counter-illustrations might be inconclusively continued. Thus, the intriguing galaxy of more 'modern' concepts and alternatives to the 'antiquated' notion of sovereignty[4]—such as active and peaceful co-existence, international solidarity or social interdependence—appears to attain at the most a change in emphasis from one to another aspect of a complex situation. Moreover, none of these alternative terms either excels by greater precision or is less likely than sovereignty to be turned to ideological uses.[5]

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[1] *Cf.* Ph. Jessup, *A Modern Law of Nations*, 1948, pp. 12 *et seq.*, and 36 *et seq.*, or E. Sauer, *Souveränität und Solidarität*, 1954, p. 93 *et seq.*

For an animated discussion of earlier attacks on the concept of sovereignty in international law, *cf.* G. W. Keeton, *National Sovereignty and International Order*, 1939, p. 145 *et seq.*

[2] See A. Ross, *A Textbook of International Law*, 1947, p. 33 *et seq.*, or E. Ruck, *Grundsätze im Völkerrecht*, 1947, p. 26.

[3] H. Kelsen, *Reine Rechtslehre*, 1934, p. 153, or Ross, *l.c.* above, note 2, pp. 45–6.

[4] To judge by recent studies of high quality, a swing of the pendulum away from the treatment of the topic on the basis of implied liberal-reformist assumptions is noticeable. *Cf.* Ch. Rousseau, *L'indépendence de l'Etat dans l'ordre international*, Hague Academy of International Law, Vol. 73 (1948), p. 173 *et seq.*; Ch. de Visscher, *Théories et Réalités en*

### I—THE PROBLEM

In this slightly bewildering situation, the task-in-chief appears to provide criteria of some general validity for the detached assessment of the contradictory trends and counter-trends in international law and organisation which are symbolised by the antithesis of independence and interdependence. In order to achieve this object, it is advisable to proceed in a manner which avoids rigorously even the suspicion of arbitrary or subconscious selectiveness, whether in favour of 'reactionary' or 'progressive' conclusions.

It will contribute to this end if, in the first place, an effort is made to reduce the problem to its proper proportions. The over-estimation of the issue is probably due in part to still widespread misconceptions of a methodological character. If it were correct to deduce any legal rules from the principle of sovereignty—or any other legal principle—for other than purely didactic purposes, it would be a matter of signal importance to know whether sovereignty was still a fundamental principle of international law or whether it ought to be exchanged for any other legal principle which had now become the 'fertile mother' of new rules of international law. If, however, together with all other principles of international law, sovereignty is recognised for what it is, that is to say, a mere abstraction from actually operative rules,[6] then much of the struggle between the giants in the realm of conceptualism turns out to be mere shadow-fighting.

*Droit International Public* (2nd ed.), p. 132 *et seq.*; D. W. Gunst, *Der Begriff der Souveränität im modernen Völkerrecht*, 1953; T. Suontousta, *La Souveraineté des Etats*, 1955, and Professor Rousseau's outspoken Preface to G. Day, *Les Affaires de la Tunisie et du Maroc devant les Nations Unies*, 1953, p. 8.

[5] From this angle, the discussion on *Sovereignty and International Co-operation* at the Lucerne Conference (1952) of the International Law Association (*Report*, p. 19 *et seq.*) and Judge Alvarez's *jurisprudence constante*, initiated with his Ind. Op. on *Membership of the United Nations* (*I.C.J. Reports 1947–1948*, p. 69), are both entertaining and instructive.

[6] See further Hague Academy of International Law, Vol. 87 (1955), p. 200 *et seq.*, and 9 *Current Legal Problems* (1956), pp. 243–4.

So long as the rules governing the principle of sovereignty are not effectively limited by others underlying whatever the advocated alternative principles may be, the reality of *lex lata* is but little affected.

At the same time, the issue of Sovereignty Evanescent or Triumphant is a real problem. Whether the term is employed to depict realities in the fields of theology, law or political science, it signifies one of two things: supremacy over others (omnipotence) or freedom from control by others (independence).

In law, supremacy and freedom tend to be expressed in terms of jurisdiction and discretion. The significance of this change in terminology depends on the answers to two questions, the one legal, and the other sociological. The former is concerned with the scope of effective limitation of the rules underlying sovereignty in favour of those governing other legal principles. The latter raises wider issues. It involves an evaluation of the real significance of any such limitations in the wider social nexus of a legal system. Thus, to understand the function of sovereignty in mid-twentieth century international law, it is necessary to treat the problem of sovereignty in a manner which avoids excluding *a priori* any potentially relevant facet, whether legal or non-legal.

## II—THE FORMS OF SOVEREIGNTY

If the history of ideas teaches any lesson, it is surely that supremacy and freedom are perennial problems. Whether we speak of these issues in terms of sovereignty or call them by any other name, they will always be with us. All that has changed and is continuously changing are the manifestations or forms which, at any particular time or in any particular environment, the phenomenon of sovereignty takes.

This reflection will act as a safeguard against undue concern with any attempt to cope with the problem of sovereignty on a purely verbal basis. It will also explain a hesitation to jettison lightly a concept which, since the days of Thomas Aquinas,[7] has well served generations of theologians, lawyers and political scientists.

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[7] On sovereignty in the political thought of ancient India, see Kautilya's *Arthaśātra* (transl. Shamastry), 1929, p. 287 *et seq.*, and on synonyms in Greek philosophy and Roman law, Bodin, *Method for the Easy Comprehension of History* (1583—transl. Reynolds), p. 172. See also E. N. van Kleffens, *Sovereignty in International Law*, Hague Academy of International Law, Vol. 82 (1953), p. 5 *et seq.*

At the same time, awareness of the multifarious aspects of the phenomenon of sovereignty will induce open-mindedness towards criticism of the ambiguity of the term *sovereignty*.[8] This can be met, however, by a technique which, in the field of philosophy, Leibniz and Christian Wolff evolved,[9] and which became subsequently known as phenomenology and, in the natural sciences and philology, as morphology. At its simplest, it amounts to the articulate elaboration of all or, at least, all relevant forms of the phenomenon under review. So long as the phenomenon remains amorphous, it may prove impossible or difficult to understand its character and implications. Once the various sides of the problem are separated, the phenomenon as a whole becomes easier to comprehend.[10]

In law, the application of this technique appears indicated when limitation of the analysis to the legal segments of a phenomenon would tend to obscure rather than elucidate its character, yet, at the same time, both its legal and non-legal forms can be clearly distinguished. Even if the phenomenon is predominantly or purely legal, this method may recommend itself. In particular, this applies if a legal phenomenon is common to a number of legal systems, but its manifestations differ because of, for instance, the community environment of municipal law and the society environment of international law. Thus, the phenomenological treatment is the congenial method in the fields of comparative law and comparative jurisprudence. In the case of the phenomenon of sovereignty, both reasons apply and explain the choice of treatment of this topic. It may, it is hoped, convince some that, if duly refashioned, the concept of sovereignty is still an eminently serviceable means of understanding the legal and political realities which we desire to explore. Thus, it is but fitting at Austin's College to offer this paper to his shades as a modest, but appreciative tribute.

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[8] See above, p. 264.

[9] The distinction drawn by Leibniz between *phenomena realia* and *imaginaria* is as topical as it ever was (*Opera Philosophica, De Modo Distinguendi Phaenomena Realia ab Imaginaria,* Vol. I, 1840, pp. 443–5). For an early definition of *phenomenon, cf.* Wolff, *Cosmologia Generalis,* 1731, § 225, p. 173: *'Phaenomenon dicitur, quicquid sensui obvium confuse percipitur.' Cf.* also J. Stone, *Legal Controls of International Conflict,* 1954, pp. xlix–l.

[10] For attempts to apply this technique to the principle of universality of international institutions, *cf.* the present writer's *The League of Nations and World Order,* 1936, and *Power Politics,* 1951, p. 430 *et seq.*

The phenomenon of sovereignty is the same from whichever angle it is explored. Some of its manifestations may, however, be more relevant for one branch of knowledge than another. The inductively verifiable raw material, as well as the doctrinal treatment of the topic, suggests that six forms of sovereignty are most likely to assist in exploring the meaning and function of sovereignty in international law and organisation. They may be grouped in three pairs, that is to say, positive and negative sovereignty, political and legal sovereignty, and, finally, absolute and relative sovereignty.

It may be helpful to set out in a table these six forms of sovereignty, together with the criteria which have determined these classifications:

| CRITERIA | FORMS OF SOVEREIGNTY | |
|---|---|---|
| Contents of Sovereignty: | Positive | Negative |
| Field of Manifestation of Sovereignty: | Political | Legal |
| Scope for Manifestation of Sovereignty: | Absolute | Relative |

(a) *Positive and Negative Sovereignty.* Sovereignty as understood in theology and the constitutional theory of the unitary State[11] means omnipotence. In both these contexts, the original semantic meaning of this term makes good sense. In speaking of the sovereignty of God, theologians seek to describe divine supremacy and plenitude of power. In this formulation, the emphasis lies on the positive aspect of the phenomenon of sovereignty, that is to say, the complete subjection of man to God. As a matter of course, a negative statement is implied in this proposition. If God is supreme or 'almighty,' He Himself cannot be subject to any other being and is in a state of absolute freedom.

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[11] On the problem of sovereignty in the federal State, see below, p. 269.

On the reasons why the identification of positive sovereignty with internal sovereignty, and of negative sovereignty with external sovereignty, is too narrow and, therefore, likely to be misleading, see below, p. 277.

The theological concept of sovereignty has been secularised to describe by way of analogy the position of those who, in relation to their own subjects, claim to be 'His lieutenants for the welfare of other men.'[12] Every community which is not dependent on any other community has a sovereign in this sense.[13] It is irrelevant whether this is an individual, as in the days of absolutism, or a collective entity, as the Queen in Parliament in the United Kingdom.

In claiming supremacy for sovereign princes, the political science of absolutism safeguarded the overriding claims of God by the formula *Dei gratia*. The significance of this is its implication. These early scholars were not impressed by the supposed dilemma that sovereignty must be either absolute or nothing. They had sufficient elasticity of mind to realise that it was perfectly feasible to visualise, subject to God's absolute sovereignty, a more relative form of sovereignty exercised by their sovereign princes. Since the days of absolutism, the bearers of positive sovereignty have changed. The reality of this form of sovereignty is, however, as potent today as ever. Some theorists of federalism have claimed that, in the federal State, the phenomenon of positive sovereignty has been eradicated. Actually, the federal State succeeds merely in increasing the number of bearers of legal sovereignty by a system of checks and balances.

If two or more entities, each of which may desire to exercise positive sovereignty over the rest, happen to exist simultaneously, they must make their choice. It is between treating sovereignty as an absolute or relative in their mutual relations.[14] If sovereignty is to be absolute, this rules out the co-existence of entities which do not accept any one in their midst as superior nor any common superior. Then, either one of these entities must succeed in attaining supremacy over the rest or all must agree to pool their sovereign rights and create a new bearer of positive sovereignty. The world State by conquest or consent illustrates positive sovereignty, treated as an absolute in the relations between a plurality of entities.

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[12] Bodin, *Six livres de la république*, 1576, Bk. I, Ch. 10.

On the origin of this terminology, *cf.* F. A. von der Heydte, *Die Geburtsstunde des Souveränen Staates*, 1952, p. 328 *et seq.* See also W. Ullmann, 64 *English Historical Review* (1949), p. 8 *et seq.* and below, note 18.

[13] Even if one of the organs of a federal State does not usurp legal sovereignty, the reality of political sovereignty cannot be eliminated in the federal pattern. See *l.c.* above, n. 10, 1951, p. 88.

[14] To simplify matters, absolute sovereignty in the theological meaning of the term is ignored in this juxtaposition. If it were to be taken into account, the situation would not be substantially altered. It would merely become necessary to distinguish between various degrees of relativity of sovereignty.

The other alternative is for the entities concerned to resign themselves to the necessity of co-existence as the overriding factor in their mutual relations. Then, they must be prepared to renounce or, at least, curb their aspirations for domination over each other. The patterns which, since the classical period of the *symmachies* of the Greek city States,[15] can be observed in the history of international relations preclude dogmatism on the minimum of equality which is compatible with co-existence. It would not, therefore, be advisable to generalise beyond this point: To the extent to which entities base their relations on the principle of equality—whether formal or substantive—sovereignty is transformed from an absolute into a relative. Correspondingly, the emphasis shifts from positive sovereignty to its implied negative.[16]

Negative sovereignty means non-recognition of any superior authority. On the level of legal relations, this situation may be expressed in terms of a right, or freedom, not to have to recognise any superior.[17] Moreover, if entities in this class recognise that certain objects are allocated to one rather than others among themselves and one another's supremacy over such objects, they thereby mutually recognise the exclusive character of this personal or territorial jurisdiction.

Once the possibility of relative sovereignty has been accepted, it is impossible to draw any line beyond which sovereignty becomes inalienable.[18] It then becomes entirely a question of

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[15] See further G. Ténékidès, *La Notion Juridique d'Indépendance et la Tradition Hellénique*, 1954. See also H. Triepel, *Die Hegemonie*, 1938, p. 355 *et seq.*, and B. Paradisi, *L'Amitié Internationale*, Hague Academy of International Law, Vol. 78 (1951), p. 329 *et seq.*

[16] See above, p. 268.

[17] *Cf.* for instance, the Letter of 1297 of the Count of Flanders on his Alliance with the King of England against the King of France (Rymer's *Foedera*, Vol. II, p. 737) and the Treaty of Alliance of the same year between the same (*ibid.*, p. 761). See also 25 B.Y.I.L. (1948), p. 55 *et seq.*, and von der Heydte, *l.c.* above note 12, p. 59 *et seq.*

[18] For a perceptive analysis of naturalist inhibitions and ideologies on this point, *cf.* P. N. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought*, 1956.

On the somewhat pragmatic resuscitation in recent Soviet legal theory circumstances whether relations are kept on a footing of negative sovereignty or whether positive sovereignty is allowed to intrude again into such a nexus. In the latter case, the resulting dependency may be restricted to the non-legal field or even formalised in legal terms.

If hierarchical relations are of a *de facto* type, lawyers tend to ignore them. If relations of this type are of a *de jure* character, their substantive analysis can still be avoided so long as they are established by consent; for any inequality based on consent is considered as leaving unimpaired the status of legal equality, however formal or hypothetical this may be. The four other forms of sovereignty serve to clarify these facets of the phenomenon of sovereignty.

(b) *Legal and Political Sovereignty.* In any social environment in which the supremacy of law is normally assured, self-limitation of the lawyer to the legal manifestations of sovereignty is not likely to present him with a manifestly distorted view of the phenomenon of sovereignty. Yet, like any other kind of blinkers, legal purism has its penalties. It fails to explain relevant problems of some moment.

One is that of the forcible replacement of one legal order by another or, in other words, the validity of revolutionary law. Another is the merely apparent elimination of sovereignty in the federal State.[19] Finally, situations of the ineffectiveness of the legal sovereign and the impotence of law in the face of 'over-mighty subjects' can hardly be understood fully in terms of the categories of thought which are at the command of the analytical purist. How can he hope to cope with *de facto* rivals of the legitimate bearers of positive sovereignty? Still, these are exceptional situations, and if they occur, they are symptoms of a serious malaise in a body politic. It is, therefore, at least arguable that, in relation to mature legal systems, strict compliance with the postulate of the self-isolation of the legal element is more impor-

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of the notion of the inalienability of State sovereignty, and its extension to nationhood, see I. Lapenna, *Conceptions Soviétiques de Droit International Public,* 1954, p. 228. For use of this terminology in Soviet practice, see Mr. Shepilov's Speech to the Supreme Soviet of February 12, 1957 (*The Times,* February 13, 1957): 'The Soviet people have been and remain opponents of Egypt's inalienable rights being curtailed by removing the Suez Canal from under Egyptian sovereignty and establishing some sort of foreign administration for the waterway.'

[19] See *l.c.* above, note 10, 1951, p. 87 *et seq.*

tant than any resulting inability of lawyers to cope with other than typical or stereotype situations.

What may be a questionable postulate in mature systems of community law becomes a serious bar to the understanding of the meaning of sovereignty in totalitarian States and international law.[20] The reason is that, in the municipal law of advanced communities, rules of public policy prevent the worst excesses of extreme social inequality. International customary law does not know of any corresponding *ordre public international*[21] and must resign itself to the supremacy of the rule of force in international relations.[22] Admittedly, the contractual quasi-order of the United Nations is more ambitious, but not equally so in relation to all members of the United Nations. This privileged position of the select few—'enshrined' as it is in the Charter of the United Nations—makes it even more necessary not to forego voluntarily any tool which is likely to provide more than a merely formalistic answer to the mystery of this peculiar type of 'sovereign equality.'

To see the relevance of these issues for purposes of legal analysis does not require any consciously sociological treatment of international law. It suffices to be endowed with the common sense and independence of minds such as Austin or Oppenheim could claim their own.

In his Lecture on *Sovereignty,* Austin examined the position of the French Government during the Allied occupation of France in 1815. As the commands issued by the Allies to the French Government and the latter's obedience were 'comparatively rare and transient,' Austin did not think that this amounted to a state of subjection which was incompatible with the continued sovereignty of the French Government.[23] In a similar way, he analysed the position of the extremely weak Saxon

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[20] On the similarities between these types of law, see further *l.c.* note 10 above, 1951, pp. 216–17.

Even on the purely analytical level, the interpretation of terms such as 'political independence' in Article 10 of the Covenant of the League of Nations or 'economic independence' in the Geneva Protocol of 1922 (*Austro-German Customs Union* case 1931—A/B 41) calls for awareness of the possibility that political (or economic) and legal independence are not necessarily synonymous terms.

[21] See further *l.c.* note 6 above, p. 376 *et seq.*

[22] See further *l.c.* note 10 above, 1951, p. 202 *et seq.*

[23] *The Province of Jurisprudence Determined,* Vol. I (5th ed. by Campbell), p. 222.

Government in relation to the members of the Holy Alliance.[24]

In more general terms, Austin considered that, although powerful States happen to be permanently superior, and feeble States permanently inferior, so long as there is no habit of command or obedience, hierarchical relations of this type are compatible with the sovereignty of weak States.[25]

Austin qualified his analysis of the position in Saxony by the significant proviso that, 'in case the commands and submission were somewhat more numerous and frequent, we might find it impossible to determine certainly the class of the Saxon community. We might find it impossible to determine certainly where the sovereignty resided: whether the Saxon Government were a government supreme and independent; or were in a habit of obedience, and therefore in a state of subjection, to the allied or conspiring monarchs.'[26]

A borderline case which puzzled Austin was Prussia's predominance over the other members of the North German Confederation. It made Austin wonder whether this hegemonial relation had not engendered habits of command and obedience so as to leave Prussia alone in a state of sovereignty and reduce the others to one of subjection.[27]

Similarly, Oppenheim was too much a scholar and realist to be oblivious of the relevance for the study of international law of the power hierarchies in international relations. He took, however, the tenable view that the balance of power system of his time reduced sufficiently the discrepancies between greater and smaller States to provide for the indispensable minimum of social equality between the subjects of international law. In his view, the 'first and principal moral' which the history of international law could teach was the need for such an equilibrium. In its absence, the omnipotence of an 'over-powerful State,' that is to say, its exercise of positive sovereignty over other States in disregard of international law could not be prevented.[28]

In a world in which discrepancies in power were less glaring than in our age, and a relatively effective system of balance of power appeared to neutralise any preponderance of power as, in fact, existed, it sufficed to point out that these conditions of international law in general, and legal sovereignty in particular, had to be borne in mind.

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[24] *Ibid.*, pp. 223 and 229.

[25] *Ibid.*

[26] *Ibid.*, p. 229.

[27] *Ibid.*, p. 229, note 1.

[28] *International Law*, Vol. I, 1905 (1st ed.), pp. 73–4.

It is instructive to compare Oppenheim's penetrating observations on this topic with the version which, since the 5th ed. (1937, pp. 80–1) has replaced the original text.

In the post-1945 era, three decisive changes have taken place. First, the process of concentration of power in international society appears to have reached its penultimate phase, and our bipolarised world is much more deeply divided than that of Austin or Oppenheim. Secondly, the discrepancies in power between the hegemonial States in each of the world's two halves and their 'junior partners,' 'allies' or 'satellites' are no longer of a merely quantitative character. The possession of such weapons as megaton bombs and ballistic rockets with nuclear warheads marks the dividing line between 'over-powerful' States and the rest of international society. Thirdly, outside the deceptive orbit of the United Nations, 'non-committed' countries are hardly a balancing third force, but objects of a continuous contest between the two world camps.[29] The somewhat anæmic character of legal sovereignty in international customary law, and of 'sovereign equality' under the Charter of the United Nations, becomes fully explicable only against this sombre background of the overshadowing reality of political sovereignty in the nuclear age.

Paradoxical as it may appear, the rise of these new Leviathans has its compensations. The existence of hegemonial powers which, in their own orbits, are either immune from challenge or can crush resistance with impunity creates a stronger type of international quasi-order than that offered by the United Nations on the level of world society. Thus, it holds out the promise of types of international law which, in effectivity, may well compare favourably with universal international law.

Admittedly, in a split world, these types of international law are limited to the sectors of the world which are controlled by one of the hegemonial powers. It may also be conceded that a hegemonial power which wields such positive sovereignty over those under its sway is itself necessarily above the law. Yet, the fact that this was the position under the Tudor monarchs does not prevent English lawyers from treating the law of Tudor absolutism as a vital period in the evolution of English law. Finally, there are differences which ought not to be minimised between the two hegemonial powers. The one has had its task largely thrust upon her; exercises it rather as a trust than as a privilege; cherishes the values of the heritage of Western civilisation and is susceptible to public opinion at home and abroad. It suffices to say of the other that, in almost every respect, it is its opposite.

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[29] See further *l.c.* note 10 above, 1951, pp. 113 *et seq.*, and 695 *et seq.*, and 36 *Grotius Transactions* (1950), p. 229 *et seq.*

The description in the Speech of the Pakistan Prime Minister, Mr. Suhrawardy, at Dacca University of the hypothetical situation of the Baghdad Pact being restricted to its four Muslim members, and the United Kingdom excluded from it, deserves to be recorded: 'Zero plus zero plus zero plus zero still equals zero' (*The Times*, December 17, 1956).

Yet when all this is said, the antipodes share a characteristic which, in order to understand sovereignty in contemporary international law and organisation, is more directly relevant. In their respective realms, any apparent subjection of either hegemonial power to law in its relations to its 'allies' or 'satellites' is purely self-willed and optional. In this respect, the attitudes taken by the Soviet Union and the United States towards the Optional Clause in the Statute of the World Court are symptomatic and not so different as, on the surface, may appear. The Soviet Union has never stooped to make a declaration under Article 36 of the Statute. The United States has done so, but excluding disputes which are essentially within her own domestic jurisdiction 'as determined by the United States of America.'[30]

(c) *Absolute and Relative Sovereignty.* The limitation of any form of sovereignty to its absolute extreme is as little justified as the attribution of a necessarily absolute character to any other notion. In fact, the very contrast of the sovereignty of God with any form of worldly sovereignty proves sufficiently the necessarily relative character of any type of sovereignty claimed by a temporal authority.[31] Nothing, for instance, prevents positive sovereignty from being 'relativised' so as to assist in explaining what happens in the case of a limitation of negative sovereignty by international law.[32] Conversely, the term *dependence* need not be used exclusively in an absolute sense. If duly 'relativised'

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[30] See further the writer's *International Law,* Vol. I, 1949, pp. 401–2.

[31] See above, pp. 268–9.

[32] See below, p. 277 *et seq.*

—as its counterpart *independence*—this term appears to fill a serious gap in terminological equipment.[33] Moreover, the distinction between forms of absolute and relative sovereignty makes it possible to find a useful place for interdependence. If dependence is not one-sided, but mutual, the substantive reciprocity of dependence is well expressed by the term interdependence.

The various states of absolute and relative sovereignty can then be tabulated in a simple scale:

| Absolute Supremacy and Independence | Relative Independence | Interdependence | Relative Dependence | Absolute Subjection and Dependence |
|---|---|---|---|---|
| | Forms of Independence and Dependence compatible with International Law | | | |

III—THE FORMS OF LEGAL SOVEREIGNTY

The description of supremacy and freedom in terms of jurisdiction and discretion in the legal sphere may be of apparent rather than real significance. If jurisdiction or discretion is overriding, it cannot be overruled. Conversely, if it can be overruled it cannot be overriding. In other words, whatever the illusions or inhibitions of individual bearers of overriding jurisdiction, this is likely to differ, at most in degree, but not in kind from sovereignty in the positive meaning of the term.

In the relations between subjects of international law territorial and personal jurisdiction—as these terms are employed in international law—are not forms of *positive* sovereignty, for they indicate independence from one another and mutually recognised areas of supremacy over *objects* of international law. Both are illustrations of *negative* sovereignty.[34] If, for instance, the death penalty is applied to the citizen of a sovereign State in his own country, this amounts to an exercise of territorial and positive sovereignty in the relations between the territorial sovereign and the condemned man. However, in the relations between the territorial sovereign and other subjects of international law, this State activity constitutes merely an exercise of negative sovereignty.

It is sometimes said that territorial and personal jurisdiction may be concurrently exercised. This is true, but only in the sense that several subjects of international law may simultaneously exercise their own exclusive jurisdiction, be it territorial or personal, over one and the same object of international law. Thus, a national abroad is subject to the territorial sovereignty of the place of his sojourn, but he may still be under legal obligations towards the sovereign of his home State. Yet, the fact that one and the same object is the addressee of commands from different sovereigns does not affect the exclusive character of relations which between either of the two sovereigns and the addressee partake of the character of positive sovereignty, but which in the mutual relations between these sovereigns illustrate the operation of two different forms of negative sovereignty.

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[33] See below, p. 281 *et seq.*

[34] See above, p. 270, and further Rousseau, *l.c.* above, note 4, 1948, p. 220 *et seq.*

It would be precipitate to assume that international law does not know of positive sovereignty. It operates through the medium of the compulsory and optional rules of international law which limit the scope of those governing territorial and personal sovereignty.[35] In every such case, one subject of international law acquires the right to command another subject to behave in accordance with the rule invoked. Whenever a new rule of customary law grows up, the existence of a general principle of law recognised by civilised nations is proved or a treaty obligation has been created, the field of negative sovereignty shrinks in favour of that of positive sovereignty.

If, for instance, a rule of international customary law or general principle of law recognised by civilised nations bids subjects of international law to treat each other's nationals in accordance with the minimum standard of international law—or a treaty embodies the most-favoured-nation standard—the rule in question establishes, potentially until invoked and actually if invoked, a hierarchical relation of command and obedience between the subjects of international law concerned.

If the rule is of a unilateral character as, for instance, a crushing peace treaty which a victor imposes on the vanquished, it is easy to perceive the state of dependency created by the treaty. Similarly, a *societas leonina* on the Roman model or an international protectorate by which the 'protected' State grants to its 'protector' the right of exclusive international representation, appears to fit well into this pattern.

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[35] For these rules, see *l.c.* above, note 6, p. 214 *et seq.*

If two States conclude an alliance, the reciprocal character of the rights of positive sovereignty which one acquires over the other may be thought to cancel out the element of subjection. Yet, whether this reciprocity is real or merely apparent depends on the circumstances of each individual case. Reciprocity may be formal or substantive. While, in the case of a reciprocal alliance between a giant power and a dwarf State, formal equality is likely to disguise actual and one-sided dependence, the position is different in the case of an alliance between States of roughly equal strength.[36]

If legal rules form part of international customary law or are recognised as general principles of law, the element of substantive reciprocity, which takes the sting out of the exercise of positive sovereignty, is no less pronounced. Would it not, therefore, be advisable to be content with the simplicity of the traditional formulation, that is to say, the limitation of sovereignty by international law or, at least, the indubitably elegant phraseology of the supremacy of international law?

If full understanding of a problem can be combined with simplicity and elegance of exposition, this is the optimum that is attainable. In this particular case, however, both these formulations appear to explain singularly little of what actually happens when international law is supposed to become the active agent in limiting sovereignty or is poised in a position of supremacy over sovereignty dethroned. Actually, both these formulations may easily come to fulfil unintended ideological functions. The objective existence of international law is taken for granted as something beyond the need of proof. It would be more to the point to inquire whether it can be proved. This, however, is too big a subject to be treated incidentally in this paper.

In the case of rules of a universal, general or particular character, whatever is taken away from one subject of international law by way of limitation of the field of negative sovereignty accrues actually or potentially to others in the form of the acquisition of corresponding powers of positive sovereignty. In the case of rules of a unilateral character, however, as in the case of a one-sided treaty, the limitation of sovereignty by international law means a unilateral assumption of positive sovereignty over the obligated State. Admittedly, this positive sovereignty—

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[36] See above, p. 272 *et seq.*

like its negative counterpart—is of a relative character. The beneficiary cannot insist on any type of behaviour on the part of the obligated State, but merely on compliance with the rule. The more serious, however, the limitation of negative sovereignty is the wider and more absolute the scope of positive sovereignty becomes. In any case, if the relativity of negative sovereignty is accepted, that of positive sovereignty is no argument against its description in terms of sovereignty. Moreover, in one respect, the exercise of positive sovereignty is truly absolute. Its bearers are entirely free agents to invoke or waive observance of the rule in question.

This means that the whole of the interplay of the rules of international law[37] can be expressed in terms of the interplay of the forms of positive and negative sovereignty. Whenever negative sovereignty is limited by optional or compulsory rules of international law, it does not vanish. What happens is that potential or actual jurisdiction is transferred and, correspondingly, negative sovereignty is transformed into positive sovereignty. If any particular rule ceases to be operative, the process works in reverse. Thus, positive and negative sovereignty are truly complementary terms.

Three doubts require, however, to be laid at rest. They relate to the character of prohibitive rules, the jurisdiction of international institutions and analogies from municipal law, which appear to militate against the analysis of rights under international law in terms of positive sovereignty.

(a) *Positive Sovereignty and Prohibitive Rules.* Who is the bearer of positive sovereignty in the case of prohibitive rules of international law? In the absence of such rules, a subject of international law may exercise its discretion as, for instance, regarding the exercise of its *jus ad bellum*. Once a prohibitive rule in this field comes into existence, does not the former right cease to exist? This is true but, even in this case, a transfer of jurisdiction and the creation of an area of positive sovereignty have occurred.

If a multilateral treaty, such as the Kellogg Pact, comes into force, and war other than in self-defence is outlawed, the parties to the treaty acquire rights of positive sovereignty in both their individual and collective capacities. Thus, in the example chosen, each of the parties may demand from all others compliance with the international quasi-order established. Yet, the former jurisdiction to wage war for other than defensive purpose has not vanished. It now rests with the collectivity of the parties to the treaty, for they are free at any time to unmake the treaty by *contrarius actus* and to hand back their joint jurisdiction to each of the participants. In the case of rules of international customary law and general principles of law recognised by civilised nations, *mutatis mutandis*, the same applies. Whether the prohibitive rule is invoked by an individual subject of international law or is waived by the collectivity of these subjects, in either case they exercise positive sovereignty. Yet, while in the one case it is relative, in the other it is absolute.

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[37] See further *l.c.* note 6 above, p. 195 *et seq.*

(b) *Positive Sovereignty and the Jurisdiction of International Institutions.* Does the view of the necessarily complementary character of the forms of positive and negative sovereignty explain the jurisdiction exercised by international institutions?

All international institutions are optional and, of necessity, exercise only the authority which is delegated to them by their members. They may do so expressly or tacitly, or merely acquiesce in an arrogation of jurisdiction on the part of an international institution. Claims made on behalf of any international institution to be entitled to exercise jurisdiction over non-members can be supported only if the exercise of this jurisdiction rests on consent, acquiescence, recognition or estoppel of the non-member concerned.[38] Thus, the acquisition of any jurisdiction by international institutions rests necessarily on acts of transfer from their member States.

Actually, the constituent instrument of any international organ lends itself readily to this interpretation. In the field in which the members decide to limit their sovereignty, each of the members acquires potential rights of positive sovereignty against all other members. By consenting to the establishment of an international institution, each member must be taken to have transferred these rights to the institution in question. Thus, the functional jurisdiction exercised by international institutions is merely the sum total of the pooled and delegated rights of positive sovereignty which result from the transfer of rights from the members to these organisations. Subsequent agreements concluded by international institutions with each other or sovereign States do not add any new feature to the picture, for whatever powers international institutions exercise is purely derivative.

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[38] See further the writer's *International Law*, Vol. I (3rd ed.), Ch. 25.

(c) *Municipal Law Analogies.* The explanation of limitations of sovereignty by rules of international law in terms of the creation of areas of positive sovereignty is likely to meet with some psychological resistance from the municipal lawyer. He may wonder whether an explanation of limitations of the freedom of action of a citizen by the Common Law or statutory law in similar terms would make sense. The simple answer is that it would not. The reason is that the two situations are not analogous, for nothing is likely to prove more misleading than analogies from one type of law to another. In particular, this applies if two types of law are so different as the mature laws of highly integrated communities and the law of a loosely organised international society.[39]

In the Queen in Parliament, English law has its composite bearer of absolute and positive sovereignty. It, therefore, has neither need nor room for additional bearers of relative and negative sovereignty.[40] The initial hypothesis of international law which relates to the co-existence of sovereign States is that these recognise one another as bearers of relative, and negative, sovereignty. Areas of positive sovereignty must, therefore, necessarily be carved out from the existing fields of negative sovereignty. Moreover, in the absence of a superior bearer of absolute sovereignty, none other than the subjects of international law, and any derivative organs which they choose to create, are available as bearers of such positive sovereignty as, in this way, may come into existence in international law.

Another difference between municipal law and international law, which is closely related to the existence of an absolute and positive sovereign in the former, and its initial absence in the latter, is the existence of rules of public policy in municipal law and their absence in international law.[41] Emphasis on potential and actual dependence as is implied in the concept of positive sovereignty is more necessary in a legal system in which subjects are so little protected against their own weakness and folly as in international law. They are free, as they choose, to limit their own sovereignty in favour of other subjects of international law. They may even validly consent to their own relegation to mere objects of international law.

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[39] See further 2 *Current Legal Problems* (1949), p. 103 *et seq.*

[40] On the position in a federal State, see above, p. 269, note 13.

[41] *Cf. l.c.* above, note 6, p. 376 *et seq.*

Affirmation of this type of positive sovereignty does not appear to run counter to any of the governing rules of international law. None of the rules of international law sets any limits to the alienable character of sovereignty. The validity of treaties by which, as in the case of international protectorates, relations of dependency under international law are created does not depend on conditions which differ from the requirements of other consensual engagements. What distinguishes a 'protected' State under international law from a colonial protectorate is merely the intention of the parties that the treaty be subject to international law, and the continued recognition of the 'protected' State as a subject of international law by the protecting power and third States.[42] So long as the international personality of the dependent State continues, the exercise of any amount of positive sovereignty by one subject of international law over another is fully compatible with these relations remaining governed by international law.

In any case, the attempts made by the World Court to cope with the problem of limitations of sovereignty on the assumption that any such limitations relate merely to the *exercise* of sovereign rights, but leave unimpaired a somewhat hypothetical status of independence appear slightly artificial.[43] It would make it necessary to allow for the existence of a number of ghosts of a 'hollow sovereignty'[44] and to introduce yet another pair of variants of sovereignty, that is to say, formal and substantive sovereignty.

Probably for tactical reasons, the World Court did not wish to state bluntly the true position. Germany was bound by the Peace Treaty of Versailles of 1919, not because this left her independence intact, but because, under international law, every subject of international law may forego its independence and enter into relations of dependence. The Court's doctrine also fails to explain the problem of the dependent and non-sovereign subject of international law.

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[42] On the attempt to relegate *inter se* relations between protecting powers and protected States to the plane of municipal law, *cf. l.c.* above, note 38, Ch. 5. *Cf.* also the apt formulation in the Final Declaration of the Tangier Conference of 1956 (Cmnd. 60—1957, p. 9) that the Sultan of Morocco had 'recovered' the totality of his powers.

[43] *Cf.* the *Wimbledon* case (1923), A 1, p. 25. See also B 10, p. 21, and B 14, p. 36.

[44] Judge Hudson's Sep. Op. in the *Lighthouses in Crete and Samos* case (1937), A/B 71, p. 127.

To be content to explain any kind of limitations of sovereignty on the ground of the growing 'interdependence of the peoples of the world'[45] might be in the spirit of San Francisco. This might also prove more acceptable to the ideological outposts of both hegemonial powers and their junior partners or satellites, for this terminology has the inestimable asset of hiding tactfully the real character of relations in which interdependence appears suspiciously akin to dependence.

The choice of dependence as descriptive of relations in which the beneficiary of rules commands and their addressee obeys is embarrassing because it states an inconvenient truth. It, however, avoids the evasiveness of the doctrine evolved by the World Court. It appears to provide a uniform explanation of the increasing number of *de facto* and *de jure* hierarchies in international relations and makes unnecessary any embarrassed exception for dependent States. In order, however, not to lead to any overstatement, this notion requires one qualification. If exercised on a footing of substantive reciprocity and mutuality,[46] positive sovereignty is compatible with relations between equals and, then, is so relativised as to justify the use of the term *interdependence*.

Emphasis on dependence as the typical consequences of the exercise of positive sovereignty in international law underlines the overriding trend in our bipolarised world society: its growing stratification and, concomitantly, the increasing importance of hierarchical relations on the world scene. In particular, this applies to the decisive relations between each of the world powers and its junior partners or satellites. If words are meant to express truth rather than hide it, it is advisable to put the emphasis on matters essential rather than peripheral. At the same time, this does not exclude expressing relations which deserve a different description in terms of either independence or interdependence.

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[45] Article 76 (b) of the U.N. Charter.

[46] See above, p. 278.

## IV—USES OF THE FORMS OF SOVEREIGNTY

To understand both the potentialities and limitations of the forms of sovereignty, it is necessary to elaborate more articulately the specific character of the phenomenological categories employed in this paper.

Every such phenomenon is an abstraction from reality.[47] The only legitimate purpose of distinguishing various forms of a phenomenon is to use them as means of classification. These forms are convenient means of coping with individual manifestations of more abstract notions on lower levels of abstraction than those congenial to most social phenomena. Thus, they are valuable aids to more concrete thinking on particular facets of such phenomena.

The forms of a phenomenon may be likened to trays on which relevant data—facts or trends—are sorted out. Frequently, all that is required to perform this task is a sound instinct and common sense. It would not be fair, however, to ask anybody to take on trust any allocation of particular data. The selective tests employed must be rationally verifiable. Like other criteria, they vary according to the object and purpose of any examination. This is true of the forms of sovereignty as much as of those of any other phenomenon.

Probably the least reliable test would be the explanation offered by any party which is directly or indirectly interested in any socially relevant set of facts. The social functions fulfilled by such manifestations and their actual effects offer less suspect guidance. These functions are primarily determined by the character and degree of cohesion of the social environment in which a phenomenon manifests itself. Thus, both these conditioning factors are highest on the list of tests which serve to assist in allocating particular data to the most significant forms of their phenomenon.

Within the compass of this paper, it is not possible to attempt more than to illustrate shortly the application of these primary tests. Actually, this is probably as much as is required, for another object of this technique is to enable anybody who has convinced himself of the helpfulness of this method to analyse for himself any other manifestations of the phenomenon of sovereignty which may attract him.

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[47] On legal abstractions in particular, see *l.c.* above, note 6.

(a) *The Character of the Surrounding Social Relations.* In any 'pure' community in the technical meaning of this term, it would be likely that the exercise of any sovereign rights were as much in performance of duties as of rights and, primarily, in the interest of the community concerned. In a 'pure' society, the opposite presumption would apply. This means that, in any actual social nexus, the verdict on the character of any exercise of sovereign rights is likely to be decisively influenced by the relative admixture of 'society' and 'community' elements in the structure of the group concerned.[48]

Thus, if any particular manifestation of sovereignty in contemporary international affairs is at issue, its accurate interpretation is likely to depend largely on an adequate assessment of its social environment, that is to say, present-day world society. The experiences gained during the last few years appear to have done little to shake the analysis of international relations in the nuclear age, both inside and outside the United Nations, in terms of power politics in disguise.[49] One thing only has become still plainer than it was before. The validity of the maxim 'The greater the truth, the greater the libel' is not confined to English Criminal Law. In a field which is honeycombed with precariously entrenched ideological positions and frequented by amateurs and professionals in the game of flying their kites of escapism, this is not altogether surprising.

It appears but consistent with the tradition established in the teaching of international law and relations at University College London to choose as illustrations manifestations of sovereignty in recent years which—in the eyes of what Oppenheim ventured to call diplomatic international lawyers—would be best covered with oblivion. From this point of view, a comparison of three apparently unrelated manifestations of sovereignty, the suppression of the Hungarian October Revolution of 1956, the Anglo-French expedition to Port Said of the same year and the *coup d'état* in Guatemala of 1954, is not uninstructive.

Even in dealing with topics of so explosive a character, it would be possible to be commendably 'discreet' or, in other words, to limit oneself to the 'safe' and, therefore, meaningless aspects of these events. All that would be necessary would be to confine the discussion to the legal form of sovereignty and refrain from evaluating the implications of these legal findings. Each of these acts, if attributable to subjects of international law other than the territorial sovereign,[50] amounts to an intervention, that is to say, an invasion of the area of negative sovereignty. Unless undertaken with the consent of the territorial sovereign or justified by an enabling rule of international law, any such intervention amounts to an illegal act.

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[48] See further 2 *Current Legal Problems* (1949), p. 103 *et seq.*, and *l.c.* above note 10, 1951, p. 12 *et seq.*

[49] See further, *l.c.* above note 10, 1951, p. 695 *et seq.*

It would be hard to find a legal justification for the first of the two Russian interventions, that is to say, the overthrow of the Nagy Government by the Russian forces stationed in Hungary. The second Russian intervention, which may have taken place at the request, or with the *ex post facto* approval, of the Russian-established Kadar Government, presents greater difficulties, for the nominal bearer of Hungarian sovereignty who was at least the outward beneficiary of this intervention would be the last to complain of any breach of sovereignty.

Assuming—although, for the time being this view rests merely on indirect evidence—that the United States, Nicaragua and Honduras had 'co-operated' in making possible the Guatemala *coup d'état*, this was as much—or as little—an illegal interference with Guatemalan sovereignty as the second Russian intervention in Budapest.[51] Once the revolutionary military junta was in power, the new bearers of Guatemalan sovereignty were as anxious as the Kadar Government to 'heal' whatever hypothetical breach of international law might have occurred.

In the case of the Anglo-French expedition to Port Said, an enabling rule which could be invoked to justify this ill-fated venture would be Article 51 of the Charter of the United Nations. The ground of intervention would then have been collective defence of Israel against the series of armed attacks which, over a prolonged period, Egypt had launched by infiltrating irregulars (*fedayeen*) from the Gaza Strip and elsewhere.[52]

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[50] In this respect, the only controversial case is that of the Guatemala *coup d'état*. It appears, however, established that the Guatemala revolutionaries used the territories of two neighbouring States, both members of the United Nations, as bases and operated with aeroplanes of United States manufacture. See further *The Annual Register of World Events*, Vol. 196 (1954), p. 329 *et seq.* *Cf.* also A. van Wynen Thomas and A. J. Thomas, *Non-Intervention*, 1956, p. 161 *et seq.*; the fair selection of extracts from the discussions in the Security Council in L. B. Sohn, *Cases on United Nations Law*, 1956, p. 371 *et seq.*, and the curious Report by Her Majesty's Minister at Guatemala, Cmd. 9277 (1954).

[51] *Ex abundanti cautela*, it may be added that, in terms of humanity or inhumanity, legally and sociologically comparable acts may still deserve very different assessment. We are not, however, concerned here with the possible and, in other contexts, relevant distinction between barbarous and civilised forms of intervention.

What results does this trilogy yield? In the cases of the intervention in Budapest and Guatemala, the new bearers of territorial sovereignty were only too willing to grant the requisite consent and, thus, to square political reality and the requirements of international law. So long as third powers did not draw from the dependence of these governments on the interventionist powers the conclusion that the dependent States had ceased to be subjects of international law[53] or the substituted governments were not entitled to be treated as either *de facto* or *de jure* governments of sovereign States, the actual lack of independence of these governments did not matter. What, then, became decisive was the consent, approval or acquiescence of these dependent governments.

The Anglo-French intervention did not lead to the establishment of a new bearer of Egyptian sovereignty. As the Egyptian Government contested the legality of the intervention, and neither side was prepared to submit the issue to legal adjudication, the position remained necessarily inconclusive in law. If, however, the Anglo-French action had led to the establishment of a new Egyptian Government on the Churchillian model of 1942,[54] it would have become indistinguishable in law from those of the Soviet Union and the United States. It, therefore, appears that, on the level of international law as applied in the *direct* relations between members of the United Nations, an initially illegal intervention can become legal by dint of the successful establishment of a more pliable bearer of sovereignty in another member State and the acquiescence of other member States in the breach of the relevant Principles of the Charter of the United Nations.

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[52] See further the writer's Letter to the Editor of *The Times*, November 8, 1956.

[53] See above, p. 282.

[54] *Cf. The Observer* (newspaper), May 26, 1946, and *Survey of International Affairs*, Vol. I: *The Middle East in the War* (2nd rev. impr.), 1953, p. 208 *et seq.*

On the threat to withdraw recognition from the King of Greece in exile to induce him to acquiesce in the regency of Archbishop Damaskinos, *cf.* Sir Winston Churchill's Letter of December 30, 1944 (Churchill, *The Second World War,* Vol. 6, 1954, p. 279).

On the level of the United Nations organs which concerned themselves with these cases, these issues took on more sophisticated appearances. In the Guatemala case, the existence of two international institutions with competing jurisdictions—the United Nations and the Organisation of American States—made it possible for action in both to be delayed until the *coup d'état* had succeeded, and the new bearer of Guatemalan sovereignty ratified the intervention.

In the case of the Russian interventions in Hungary, the General Assembly of the United Nations passed recommendations in which it affirmed the illegality of these interventions and exhorted the Soviet Union to desist from further interference with Hungarian domestic matters. Unless, however, the General Assembly refuses to treat the Kadar Government as effectively representing one of the 'sovereign and equal' members of the United Nations, it will find it increasingly difficult to refuse to recognise that the utter dependence of the government of one member State on that of another is incompatible with the principle of the 'sovereign equality' of the members of the United Nations.

In the case of the 'armed conflict' in the Near East, the General Assembly did not even attempt to explore the possibility that, under Article 51 of the Charter, the action taken by Israel and the Anglo-French intervention might be justifiable. It passed resolutions which took for granted the illegality of the action taken by the three Powers.

In law, the inconclusive debates in the Security Council on the Guatemalan *coup d'état* and the resolution passed by the General Assembly on Hungary and the Near East amounted very much to the same thing, for all these resolutions were but recommendations. In each case, however, what happened and did not happen did not lack metalegal significance. The reactions of the other members of the United Nations made it possible for the interventionist powers to gauge accurately whether other States would desire to fall back on their own reserve powers of collective defence under Article 51 of the Charter or, in other words, wish to recover their freedom of action.

Viewed in the light of the pattern of political sovereignty, it becomes intelligible *why*, in a system of power politics in disguise, some interventions are successful and, ultimately, tend to become legalised and *vice versa*. In the case of Guatemala, it was clear that the Soviet Union did not seriously challenge the exercise of political sovereignty by, and on behalf of, the United States inside the Western hemisphere. Moreover, this *coup d'état* had the sympathy of the greater number of the members of the Organisation of American States and the Western powers at large. Thus, in fact, the United Nations had to accept a new type of Monroe Doctrine, which equated the discreet exercise of positive sovereignty by one of the hegemonial powers inside its undisputed orbit with the principle of 'sovereign equality' in the Charter of the United Nations.

Conversely, over Budapest, the United States made it plain that it would not use the Platonic condemnation by the General Assembly of Russian intervention in Hungary as a justification for a counter-intervention of her own with incalculable consequences. Thus, again, recommendations of the General Assembly masked discreetly the constitutional inability of the United Nations to prevent or redress the exercise of political sovereignty by one of the hegemonial powers within its own power radius unless the other world power is prepared to make the issue a *casus belli*.

By way of contrast, the Near Eastern intervention underlined the consequences of the assertion without the consent of their hegemonial power of political sovereignty by States within the purview of one of the world powers. It exposed this intervention to the full onslaught of the other hegemonial power. The exercise of its full weight by the one, and the pronounced passivity of the other, super-power gave an appearance of effectiveness to the relevant resolutions of the General Assembly and enabled it boldly to proclaim its rejection of an Anglo-French Monroe Doctrine in the Near East.

Thus, these cases of intervention illustrate well the meaning of sovereign equality in the Charter of the United Nations. In principle, sovereign equality is incompatible with the unilateral assumption of political sovereignty by one member of the United Nations over another. If, however, one of the world powers takes such action, and the other tacitly concedes the 'essentially domestic' character of this exercise of jurisdiction—or, with the tolerance of at least one of these powers, any other State acts in their image[55]—it becomes evident that, under the Charter of the United Nations, some of its members are more sovereign and equal than others. The scope of their exercise of positive sovereignty, and the degree of the dependence established in this way, are the measure of the relevance of viewing such relations in terms of political and positive sovereignty.

In cases in which a hegemonial power is allowed to substitute with impunity bearers of sovereignty in other member States, Paragraph 7 of Article 2 of the Charter of the United Nations comes to fulfil a new function. Once the *fait accompli* has been accomplished, the clause tends to operate retroactively in favour of the factual monopoly of hegemonial intervention. In situations of this type, the international quasi-order of the United Nations becomes ineffective and gives way to sectional, but more effective international orders enforced by sovereigns who, in fact, are *legibus soluti.*

In the relations between 'ordinary' members of the United Nations, 'sovereign equality' means reciprocal respect for the legal and negative sovereignty of member States. In those, however, between the 'overmighty' members and others in a state of *de facto* dependence, it means exactly the opposite, that is to say, sovereign inequality and acceptance of the political and positive sovereignty of those above the law of Charter.[55a]

Awareness of the scope in the United Nations for the existence of relations on such a footing of dependence indicates the danger for accurate analysis which would result from acceptance of any of the more 'modern' alternative terms such as interdependence, active and peaceful co-existence or other similar appellations. They are appropriate only to designate relations of truly mutual dependence. If, in relation to contemporary world affairs, these terms were used exclusively to point out goals not yet attained on a global scale, they would be beyond reproach. If, however, they are equated indiscriminately with the highly ambivalent reality of the United Nations, their abuse is hard to avoid. They tend to become either euphemistic disguises of less attractive, but more real relations of an essentially hierarchical character or purely verbal forms of escapism.

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[55] From this point of view, it is worth while examining whether, in relation to Kashmir, an Indian Monroe Doctrine is in the making.

[55a] *Cf.* L. C. Green, 'The Double Standard of the United Nations,' 11 *Year Book of World Affairs* (1957), p. 104 *et seq.*

(b) *The Intensity of the Surrounding Social Relations.* Emphasis on the ideological and utopian elements in the interpretation of world affairs in terms of interdependence rather than dependence is open to an intrinsically irrelevant, but nonetheless favoured form of criticism. It is supposed to be unhelpfully destructive and oblivious of, in a 'long view of the matter,' more important constructive trends in international society.

Is not the scope of international law continuously widening? In Professor Jessup's terminology, is there really any intrinsic difference between Morocco's desire for separation from France —meanwhile fulfilled—and Mary's urge to be liberated from Frank at Reno or elsewhere? Have not relations with a foreign element between individuals, between corporations and between corporations and governments and those between subjects of international law at least a decisive negative element in common? Is not the choice of the applicable law frequently governed by considerations which make its application one *ab inconvenienti*? Would it not be preferable that the choice should be made by reference to intrinsically more congenial criteria, and these were elaborated in a new branch of 'transnational' law? Is there not a growing 'inter-penetration' of international and municipal law, and are there not encouraging signs of the growth of an international co-operative law?[56] In short, as matters appear to look from the international hothouses of New York and Geneva and the old world quietude of the Hague Peace Palace, should not the emphasis be put on what may 'properly' be regarded as a 'progressive' view of international law and organisation?[57]

Admittedly, elements of scepticism and faith, constitutional or professional, enter into any qualitative assessment. Yet, are generations of international lawyers who are but repeating in different words what they have said in previous pre-war periods and, on fundamentals, have been so often disappointed in their own expectations, and have disappointed others with their earlier prognoses,[58] entitled to be again taken on trust? For what evidence can they adduce for their protestations of faith?

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[56] For representative and instructive illustrations of this attitude, *cf.* C. W. Jenks, 31 B.Y.I.L. (1954—published 1956), p. 1 *et seq.*; Ph. C. Jessup, *Transnational Law*, 1956; K. Loewenstein, 48 A.J.I.L. (1954), p. 222 *et seq.*, and W. Friedmann, 50 *ibid.* (1956), p. 475 *et seq.*

[57] Sir Hersch Lauterpacht, 32 B.Y.I.L. (1955–56), p. 1.

The issue is not merely one of possible disagreement on the conditioning effect of world power politics on international law and organisation. The self-styled 'progressive' school of thought appears to suffer from a noticeable proneness to overgeneralisation in an understandable tendency to underpin its somewhat irrational optimism. By way of an antidote, it may be advisable to insist politely but firmly on the need for more concrete thinking and to provide further assistance towards this end.

Are the trends which, for instance, are supposed to be indicative of the increasing scope of international law or the growing inter-penetration of international law and municipal law really characteristic of international law at large? Are they not tendencies which, at the most, can be discerned only in international law as applied on certain levels of international integration? A few illustrations must suffice to bring out the relevance of this criterion, at least in relation to contemporary manifestations of sovereignty.

On the level of international customary law, a distinct movement from positive, to negative, sovereignty is discernible. The rules underlying the principles of consent, good faith, international responsibility and freedom of the seas appear especially affected by this trend towards negative sovereignty.[59] It would, however, be unwarranted to draw general conclusions from international law as applied on the level of lowest international integration in favour of an unqualified thesis of negative sovereignty triumphant. At the same time, applied to the relations between the two world camps, this view of the matter would be, at least relatively, less inaccurate than that of sovereignty evanescent.[60]

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[58] See further 9 *Current Legal Problems* (1956), p. 235 *et seq.*

[59] See further *l.c.* above, note 6, p. 195 *et seq.*

On the questionable assumptions that to throw in doubt the jurisdictional immunities of foreign States amounts to another blow against the privileged position of the State as compared with the individual and contributes to the extension of the rule of law, symptomatic doctrinal attempts have been made to whittle down to insignificance such consensus as, in diplomatic and judicial practice, still exists on this issue. See, for instance, H. Lauterpacht, 28 B.Y.I.L. (1951), p. 220 *et seq.* While these assumptions, however unjustified on a world scale, may appear progressive, they are, in fact, merely indicative of a trend from positive, to negative, sovereignty in international law. This technique of presentation of topics permits a remarkable combination of extreme 'idealistic' argumentation with unswerving support of negative sovereignty. The method is applicable, and has been applied with a measure of success, to topics as varied as the expropriation of foreign property; the continental shelf; the legality of the bribery of members of enemy forces and the compatibility of the use of the hydrogen bomb with the rules of warfare. See further 5 *Current Legal Problems* (1952), p. 308 *et seq.*, and 8 *ibid.* (1955), p. 229 *et seq.*

On the level of international law as applied inside the United Nations, it appears essential to distinguish between different types of relations:

(1) Relations in which permanent members of the Security Council, with their privileges, are involved.
(2) Relations between hegemonial powers and others inside their own world camp.
(3) Relations between members of one of the world camps and 'non-committed' members of the United Nations and between 'non-committed' members of the United Nations.
(4) Relations governed by the Optional Clause of the Statute of the World Court.

Within the compass of this paper, it is not feasible to work out in detail the average correlations of these types of relations and particular manifestations of sovereignty. It may, however, be helpful to state at least some of these correlations in the form of tentative working hypotheses.

In relations of types 1 and 2, the forms of political and positive sovereignty tend to be preponderant. Relations of type 3 provide illustrations of the possibility of a different type of political sovereignty: small-power lawlessness. In a broad belt, covering the world frontier between the two global camps from North Africa to South-East Asia, the somewhat hypothetical freedom of 'non-committed' countries to opt for the Communist world camp and the chance to prove their nuisance-value in the General Assembly has put a premium on members of the United Nations in this area. With calculable lack of risk, they become increasingly accustomed to hold Western powers and investors to ransom. The expropriation of the Anglo-Iranian oil refinery at Abadan was the beginning of a disturbing chain reaction. Acquiescence of the Western powers in this relapse into lawlessness disguises only thinly the anarchic and pristine form of sovereignty which raises its head in this strategic no man's land between East and West.

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[60] See further *l.c.* above, note 29.

In the General Assembly of the United Nations, shifting combination of small-power groupings produce their own type of perversion of Paragraph 7 of Article 2 of the Charter.[61] Their own particular brand of purported political and positive sovereignty consists in a morbid disdain[62] for a clause which, in a world of increasing stratification, might form some, however precarious, protection against world-power hegemony.

It would be pleasing to be able to contrast relations pertaining to type 4 with the other three types of relations on the level of the United Nations and hold them out as shining illustrations of relations in which the international judiciary does its utmost to preserve a calculable balance between negative and positive sovereignty on the legal level. Advisory Opinions, such as those on *Interpretation of Peace Treaties (Second Phase*—1950) or *Reservations to the Genocide Convention* (1950), not to speak of the hardly disguised exercise in law-making of the Judgment in the *Anglo-Norwegian Fisheries* case (1951), provoke rather a different line of thought.[63] These decisions indicate the scope of the discretionary powers which, on the basis of the consent of the parties and the application of wide and elastic rules of international law, international judicial institutions are able to arrogate to themselves.

Findings which vaccilate so incalculably between the most meticulous respect for negative sovereignty and outright judicial legislation come dangerously close to the dispensation of positive sovereignty between litigants. The fact that less than half of the members of the United Nations are signatories to the Optional Clause, and most of these do not appear unduly anxious to submit contentious disputes to the World Court, appears to confirm acute awareness of this situation in the chancelleries of the powers.

Analysis of the constitutions and, still more, the actual attainments of the Specialised Agencies of the United Nations proves equally suggestive. It invites further consideration whether it would not be advisable to add another pair to the six forms of sovereignty, that is to say, the distinction between real and apparent transfer of positive sovereignty. In two different types of international institution this transfer is real enough, but they are hardly typical of world organisation at large.

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[61] See above, p. 290.

[62] See further United Nations, *Repertory of Practice of United Nations Organs,* Vol. I, 1955, p. 55 *et seq.*; Professor Rousseau's Report to the *Institut de Droit International,* 44 (I) *Annuaire* (1952), p. 137 *et seq.*; the discussion on the Report 45 (II) *ibid.* (1954), p. 108 *et seq.,* and T. Komarnicki, 60 R.G.D.I.P. (1956), p. 550 *et seq.*

[63] See further 4 *Current Legal Problems* (1951), p. 1 *et seq.* and *l.c.* above, note 38, *passim.*

The one is illustrated by the North Atlantic Pact and the Warsaw Pact.[64] The other is the type of supra-national institution on the model of the European Coal and Steel Community, the functional substitute for the political federation of States which become increasingly conscious of the fact that, in isolation, they are no longer 'viable.'

In both cases, the institutions created wield unmistakably political and positive sovereignty.[65] Hegemonial leadership, in the one case, and anticipation of ultimate amalgamation, in the other, explain why these high levels of international integration have been attained. Then, it becomes less far-fetched to speak of legal and negative sovereignty becoming increasingly meaningless, and the borderline between international law and municipal law being correspondingly blurred. If this is so, it is not because, in these relations, sovereignty in its most innocuous and defensive form is ousted, but because it gives way to sovereignty of a more virile type. Political and positive sovereignty claims its birthright of overriding competence.

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[64] For a vivid account of the Russian attempts made since the end of the Second World War to establish their political, military and economic hegemony over Yugoslavia, *cf.* V. Dedijer, *Tito,* 1953, p. 317 *et seq.*

[65] The commitment undertaken by the United Kingdom not to withdraw from the Continent the effective strength of the United Kingdom forces assigned to the Supreme Allied Commander, Europe, 'against the wishes of the majority of the High Contracting Parties [of Western European Union] who should take their decision in the knowledge of the views of the Supreme Allied Commander, Europe' (Article VI of Protocol II on Forces of Western European Union, October 23, 1954—Cmd. 9498 1955)), and the attitude taken by Western European Union towards the British request for consent to considerable withdrawals proves that it is no exaggeration to describe such jurisdiction in terms of positive sovereignty. By way of contrast, the United States remains a free agent regarding the strength of its forces stationed in Germany (see further *The Times,* March 15, 1957).

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